CLERK'S COPY.

192

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 453

THE PENFIELD COMPANY OF CALIFORNIA AND A. W. YOUNG, PETITIONERS,

vs.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1946.

CERTIORARI GRANTED NOVEMBER 18, 1946.

No. 11173

United States

Circuit Court of Appeals

For the Ninth Circuit.

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

vs.

THE PENFIELD COMPANY OF CALIFORNIA and A. W. YOUNG,

Appellees.

Transcript of the Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 661 Howard Street, San Francisco

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(Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.)

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

ROGER S. FOSTER, Solicitor

18th and Locust Streets
Philadelphia 3, Pa.

HOWARD A. JUDY,

Room 1301, 625 Market St.
San Francisco 5, Calif.

G. MORGAN CUTHBERTSON,

Room 1737, 312 N. Spring St.
Los Angeles, Calif.

For Appellee:

MORRIS LAVINE

619 Barlett Bldg.
Los Angeles 14, Calif. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the Southern District of California, Central Division

Civil Action No. 2863-P.H.—Civ.

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

vs.

THE PENFIELD COMPANY OF CALIFORNIA,

Respondent.

AFFIDAVIT IN SUPPORT OF RULE TO SHOW CAUSE WHY A. W. YOUNG, SECRETARY-TREASURER, PENFIELD COMPANY OF CALIFORNIA, SHOULD NOT BE ADJUDGED IN CONTEMPT

State of California,
County of Los Angeles,—ss.

Charles R. Burr, being first duly sworn, does on oath depose and say that:

I.

On April 13, 1943, there was filed in this Court by the Applicant (hereinafter referred to as the Commission) a document entitled "Application for Order to Require Witness to Appear and Produce Documentary Evidence," which recited, among other things, that the Commission had on May 14, 1942, pursuant to Section 20 (a) of the Securities

Act of 1933, as amended (15 U.S.C. 77t (a)), ordered that an investigation be made as to facts and circumstances concerning possible violations by Bourbon Sales Company and others of Sections 5 (a) and 17(a) (18 U.S.C. § 77 (e) and 77 (q)) of said Act. The application [2] further alleged that the Commission, on April 8, 1943, amended its order of May 14, 1942, by extending the investigation to also cover facts and circumstances concerning alleged violations by Penfield Company of California of the aforementioned Sections of the Act. It was further alleged that the said Commission orders of May 14, 1942, and April 8, 1943, pursuant to the provisions of Section 19(b) of said Act (15 U.S.C. 77 (s) (h)), appointed officers for the purpose of that investigation and empowered them to administer oaths or affirmations, subpoena witnesses, compel their attendance, and require the production of any books, papers, correspondence, memoranda, and records deemed relevant to the inquiry.

II.

It was further alleged in said Application that, pursuant to the powers and duties arising from the aforementioned Commission orders, C. J. Odenweller, Jr., a duly designated officer of the Commission, thereafter caused to be issued a subpoena duces tecum requiring the production before him of certain described books and records of the Penfield Company of California, at 1737 United States Post Office and Courthouse Building, Los Angeles, California, on the 19th day of April, 1943, at 10:30

o'clock A.M., and that service of said subpoena was made on April 10, 1943, by personal delivery of a duplicate original thereof to the Attorney for the Penfield Company of California, who agreed to accept service for said company.

III.

It was further alleged in said Application that the Penfield Company of California refused to appear and produce the books and records as specified and required in the aforementioned subpoena duces tecum and that by such refusal the Penfield Company of California had impeded and was continuing to impede the progress of the Commission's investigation.

IV.

Upon the filing of the Application, as aforesaid, an order was issued by this Court, directed to the Penfield Company of California, to appear before the Honorable Peirson M. Hall, Judge of the above-entitled Court in the City of Los Angeles on the 19th day of April, 1943, and then and there show cause why [3] an order should not issue as prayed in said Application.

V.

On the 19th day of April, 1943, said Application came on regularly for hearing before the Honorable Peirson M. Hall, Judge presiding, and such proceedings were had that the Court thereafter, on June 1, 1943, ordered A. W. Young, Secretary-Treasurer of the Penfield Company of California, to appear before C. J. Odenweller, Jr., on the 8th

day of June, 1943, and at any adjournments thereof as might be determined from time to time, then and there to produce the books and records of the Penfield Company of California as described in said order. The said order of June 1, 1943, further ordered that, in accordance with the stipulation and agreement of the parties made in open court, the books and records as aforesaid, in lieu of their physical production, should be made available to such officer and employees of the Commission as might be designated for such purpose at the office of the Penfield Company of California in Los Angeles, California.

VI.

Appeal from the said order of this Court on June 1, 1943, was noted by the Penfield Company of California on June 1, 1943, and on the same day proceedings to enforce said order were stayed pending final determination of said appeal.

VII.

On November 13, 1944, the mandate of the Circuit Court of Appeals for the Ninth Circuit was issued affirming the said order of this Court dated June 1, 1943, and on December 7, 1944, the said mandate was ordered filed and spread upon the minutes of this Court.

VIII.

On January 16, 1945, the order of investigation of the Commission of May 14, 1942, was further amended by the designation of Charles R. Burr, your affiant, and Leo J. Sherman as additional

officers of the Commission, for the purpose of conducting such Commission investigation. A copy of said Commission amended order, dated January 16, 1945, is annexed hereto, marked Exhibit A, and made a part hereof.

IX.

On January 16, 1945, your affiant, pursuant to the authority conferred [4] upon him under the order of the Commission dated January 16, 1945, addressed and caused to be deposited in the United States mails, a communication to A. W. Young, Secretary-treasurer of the Penfield Company of California, in the form and content of Exhibit B hereto, annexed and made a part hereof, advising said A. W. Young that your affiant would call at the offices of the Penfield Company in Los Angeles, California, on January 24, 1945, for the purpose of examining the books and records referred to in the order of this Court dated June 1, 1943, a copy of which order was enclosed in said letter. Copies of affiant's letter and enclosure were mailed to A. W. Young at 683 Kelton Avenue, West Los Angeles, California; Morris Lavine, Esq., 20 Bartlett Building, Los Angeles, California; Francis A. Reilly, Esq., 6233 Hollywood Boulevard, Hollywood, California; and Flanagan, Wilson & Thomas, attention of Philip L. Wilson, Jr., 453 South Spring Street, Los Angeles, California.

X.

On January 24, 1945, affiant, together with Leo J. Sherman, the other officer designated in the

aforementioned Commission's amended order of January 16, 1945, presented themselves at the office of the Penfield Company of California in Los Angeles, California, and demanded to see the books and records referred to in the order of this Court dated June 1, 1943, but such demand was refused.

CHARLES R. BURR.

Subscribed and sworn to before me this 25th day of January, 1945.

[Seal] G. M. CUTHBERTSON,

Notary Public in and for the County of Los Angeles, State of California. [5]

EXHIBIT A

United States of America

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 16th day of January, A. D. 1945

In the Matter of

Bourbon Sales Corporation, Penfield Company, L. M. Ulmsted, Eugene Tereny, Harold C. Jordan, Donald F. Crow, Glen A. Tantner, Frank Black, K. A. Shropshire, A. W. Young, Penfield Company of California.

SUPPLEMENTAL ORDER DIRECTING INVESTIGATION AND DESIGNATING OFFICERS TO TAKE TESTIMONY

I.

On May 14, 1942, the Commission issued an order directing an investigation of Bourbon Sales Corporation, Penfield Company, L. M. Umsted, Eugene Tereny, Harold C. Jordan, Donald F. Crow, Glen A. Tanner, Frank Black and K. A. Shopshire to determine whether they had violated the provisions of Sections 5(a) and 17(a) of the Securities Act of 1933, which order was supplemented on February 13, 1943, by naming an additional officer to conduct the investigation. On April 8, 1943, the Commission further supplemented its order and added A. W. Young and the Penfield Company of California as respondent. The order was further supplemented on July 19, 1944, when the Commission named an additional officer to conduct the investigation.

II.

It Is Hereby Ordered that the order and supplemental orders of the Commission mentioned in paragraph I hereof be and they hereby are further amended by designating Charles R. Burr and Leo J. Sherman as additional officers of the Commission.

By the Commission.

/s/ ORVAL L. DUBOIS,
Secretary. [7]

EXHIBIT B

LAB:JLT/U

12

January 16, 1945

Mr. A. W. Young
Secretary-Treasurer
The Penfield Company of California
1427 South Robertson Boulevard
Los Angeles, California

Re: Securities and Exchange Commission v. The Penfield Company of California, Civil Action No. 2863 in the District Court of the United States for the Southern District of California, Central Division.

Dear Sir:

As doubtless you have been advised, the mandate of the Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court in the above-entitled matter, was filed and entered upon the record of the District Court on December 7, 1944.

The undersigned, by and under the direction of the Securities and Exchange Commission, will call at the office of the Penfield Company at 10:00 o'clock on the morning of Wednesday, January 24, 1945, for the purpose of examining those books and records referred to in the Order of Judge Peirson M. Hall, dated June 1, 1943, which constituted the

judgment above referred to. A copy of Judge Hall's Order is inclosed.

Yours very truly,

(Signed) CHARLES R. BURR,
Assistant Regional Administrator. [8]

ccs: A. W. Young
683 Kelton Avenue
West Los Angeles, California

Morris Lavine, Esq.
620 Bartlett Building
Los Angeles, California

Francis A. Reilly, Esq.
6233 Hollywood Boulevard
Hollywood 28, California

Flanagan, Wilson & Thomas
Attention Philip L. Wilson, Jr.
453 South Spring Street
Los Angeles, California [9]

EXHIBIT B (ENCLOSURE)

Copy

Edward H. Cashion, Counsel; John F. Davis, Solicitor; C. J. Odenweller, Jr., Regional Administrator; James M. Evans, Attorney, Attorneys for Applicant, Securities and Exchange Commission, Room 1737, United States Post Office and Courthouse, Los Angeles, California.

In the District Court of the United States for the Southern District of California, Central Division

Civil Action No. 2863-P.H.—Civ.

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

vs.

THE PENFIELD COMPANY OF CALIFORNIA, a California Corporation,

Respondent.

ORDER

This Cause came on to be heard on return of a rule to Show Cause why the Respondent should not be required to comply with a subpoena duces tecum, a copy of which is attached to the Application herein as Exhibit C.

Upon the pleadings, the evidence, and the statement and briefs of counsel for the parties herein, the Court finds that the Applicant has made sufficient and reasonable showing entitling it to have its subpoena duces tecum enforced and to have produced, pursuant thereto, the books, records and documents hereinafter set forth, which are germane to the subject matter of the investigation instituted by the Applicant pursuant to Section 19 (b) of the Securities Act of 1933, (15 U.S.C. §77s(b)) and which are material and relevant to such inquiry.

It Is Therefore Ordered that A. W. Young, Secretary-Treasurer of The Penfield Company of California, appear before C. J. Odenweller, Jr., an officer of Securities and Exchange Commission, or such other person or persons as may be designated by Securities and Exchange Commission, on the 8th day of June, 1943, and at any adjournments thereof as determined by said officer or employee of Securities and Exchange Commission, at Room 1737 of the United States Post Office and Courthouse, Los Angeles, California, and to produce the following books, paper and documents of The Penfield Company of California and relating to the business carried on and conducted by the said The Penfield Company of California:

1. Minute Book.

2. All stock certificate stub books and cancelled certificates of common and preferred stock.

3. Alphabetical list of stockholders and addresses (if not shown on stub books indicated in Item No. 2 above.)

4. General ledger.

5. Cash book.

6. General journal.

7. Records reflecting the sale of whiskey and/or whiskey warehouse receipts by the corporation. [11]

8. Records relating to the sale of bottling contracts of Bourbon Sales Corporation, Louisville, Kentucky, by the corporation.

9. Records relating to the sale of bottling contracts of The Penfield Company of California, by the corporation.

10. Correspondence files, including letters received from and copies of letters sent to, all stockholders of The Penfield Company of California.

11. Correspondence files containing letters received from, and copies of letters sent to, all persons to whom bottling contracts of Bourbon Sales Corporation or The Penfield Company of California were sold.

12. All cancelled checks of the Corporation.

13. Copies of confirmation or advices delivered in connection with the sale of stock of The Penfield Company of California or the sale of bottling contracts of Bourbon Sales Corporation, or The Penfield Company of California.

14. All original journal entries or journal vouchers supporting entries appearing in the general journal or cash books.

15. Copies of all prospectuses, sales material, sales letters, material in salesman's kits or similar documents used in connection with the solicitation and sale of stock in The Penfield Company of California.

16. Copies of all prospectuses, sales material, sales letters, material in salesmen's kits or similar documents used in connection with the sale of bottling contracts of Bourbon Sales Corporation of The Penfield Company of California.

17. Purchase invoices or records supporting the acquisition of whiskey, whiskey warehouse receipts or bottling contracts by The Penfield Company of California from private individuals for cash or in exchange for stock, bottling contracts or other securities. [12]

18. Purchase invoices or other records supporting the acquisition of whiskey or whiskey warehouse receipts from distillers, whiskey warehouse receipts brokers or other persons or companies engaged in the whiskey business.

19. Sales invoices or records supporting the disposition of whiskey, whiskey warehouse receipts or bottling contracts procured from investors.

20. Employment or other records showing names of all employees, of salesmen or other personnel with last known addresses.

It Is Further Ordered, that in accordance with the stipulation and agreement of the parties made in open court, that the books, papers and documents herein ordered to be produced, as aforesaid, in lieu of their physical production as heretofore ordered, shall be made available to such officer and employees of Securities and Exchange Commission as may be designated, at the office of Respondent, at 8900 Beverly Boulevard, Los Angeles, California.

Jurisdiction of the Cause is written for the purpose of giving full effect to this Order and for the purpose of making such other and future Orders and Decrees, or taking such other action, if any, as

may become necessary or appropriate to carry out and enforce this Order.

Dated: June 1st, 1943.

PEIRSON M. HALL,
United States District Judge.

Approved as to form.

FRANCIS A. REILLY,
Attorney for Respondent.

[Endorsed]: Filed Jan. 24, 1945. [13]

[Title of District Court and Cause.]

ORDER

Upon reading and considering the verified "Affidavit for order to Adjudge A. W. Young, Secretary-Treasurer of the Penfield Company of California, in Contempt," this day filed in the above entitled action, and good cause being shown thereby;

It Is Ordered that A. W. Young, Secretary-Treasurer of the Penfield Company, appear before the undersigned Judge of the above-entitled Court, in the United States Courthouse in the City of Los Angeles, California, on the 5th day of February, 1945, at 2:00 o'clock, P.M. of that day, or as soon thereafter as the matter may be heard, and show cause, if any there be, why a further order should not be made herein, ordering and directing said A. W. Young, Secretary-Treasurer of the Penfield Company to show cause why an order should not

be made holding said A. W. Young in contempt of this Court and to be dealt with accordingly.

Dated: January 23, 1945.

PEIRSON M. HALL,
United States District Judge.

AFFIDAVIT OF SERVICE BY MAIL

State of California,
County of Los Angeles—ss.

Doris Dillon Carlton, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 1737 U. S. Post Office and Courthouse, Los Angeles, California. That on the 24th day of January, A. D. 1945, affiant served the within Order in said action, by placing a true copy thereof in an envelope addressed to Morris Lavine, the attorney of record for said Respondent in the Ninth Circuit Court of Appeals and Flanagan, Wilson & Thomas, the attorneys of record for said Respondent in this Court, at the business addresses of said attorneys, as follows; Morris Lavine, Esquire, 620 Bartlett Building, Los Angeles, California, and Flanagan, Wilson & Thomas, Attention Philip L. Wilson, Jr., 453 South Spring Street, Los Angeles, California, and by then sealing said envelope and depositing same, with postage thereon fully prepaid, in the United States Mail at Los Angeles,

California, where is located the offices of the attorneys for the persons by and for whom said service was made. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

DORIS DILLON CARLTON.

Subscribed and sworn to before me this 24th day of January, 1945.

[Seal] G. M. CUTHBERTSON,

Notary Public.

[Endorsed]: Filed Jan. 24, 1945. [15]

[Title of District Court and Cause.]

ORDER

Upon reading and considering the verified "Affidavit for Order to Adjudge A. W. Young, Secretary-Treasurer of the Penfiled Company of California, in Contempt," filed in the above entitled cause on January 24, 1945, and further upon consideration of the oral arguments this day made in open court on the order issued by this Court on January 24, 1945, directing A. W. Young, Secretary-Treasurer of the Penfield Company, to show cause why a further order should not be made directing him to show cause why an order should not

be made holding him in contempt of this Court, and good cause appearing therefor;

It Is Ordered that A. W. Young, Secretary-Treasurer of the Penfield Company, appear before the undersigned Judge of the above entitled court in the United States Courthouse in the City of Los Angeles, California, on the 26th day of February, 1945, at 10:00 o'clock a.m. of that day, or as soon thereafter as the matter may be heard, and show cause, if any there be, why an order should not be made holding said A. W. Young, Secretary-Treasurer of the Penfiled Company, in contempt of this Court, and to be dealt with accordingly. [16]

It Is Further Ordered that this order and all supporting affidavits shall be served upon the said A. W. Young, Secretary-Treasurer of the Penfield Company of California, by the United States Marshal or one of his deputies.

Dated: February 8, 1945.

PEIRSON M. HALL,
United States District Judge.

Approved as to form.

MORRIS LAVINE,
By FULTON B. SAFIN,
Attorney for Respondent.

[Endorsed]: Filed Feb. 8, 1945. [17]

At a stated term, to-wit: The February Term, A. D. 1945, of the District Court of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 2nd day of July, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Peirson M. Hall, District Judge.

[Title of Cause.]

This cause coming on for hearing on Order to Show Cause why A. W. Young, Secretary-Treasurer of the Penfield Company of California, should not be held in contempt of Court and dealt with accordingly, pursuant to order filed February 8, 1945; G. Morgan Cuthbertson, Esq., appearing as counsel for the plaintiff; Morris Lavine, Esq., appearing as counsel for the defendant:

Each of the said counsel makes a statement. Defendant Young is now found guilty of contempt of the Order to Produce Books and Records of the defendant company and it is the judgment of the Court that Defendant Young pay a fine of $50 and stand committed until paid, following which, on motion of Attorney Lavine, the defendant is allowed until 10 a.m., July 3, 1945, to pay the said fine. [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Securities and Exchange Commission, the applicant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment and order of this Court, entered July 2, 1945, which fined A. W. Young, secretary-treasurer of the respondent, $50 for contempt and ordered him to stand committed until the fine was paid.

Dated: September 24, 1945.

ROGER S. FOSTER,
Solicitor.

HOWARD A. JUDY,
Regional Administrator.

G. MORGAN CUTHBERTSON,
Attorneys for Securities and Exchange Commission.

[Endorsed]: Filed Sept. 26, 1945. [19]

[Title of District Court and Cause.]

STATEMENT OF POINTS

This proceeding is one for civil contempt against A. W. Young, secretary-treasurer of the respondent, for disobedience of the order of this Court dated June 1, 1943, affirmed by the Circuit Court of Appeals, directing Young to produce specified

books and records of the respondent for examination by the appellant, pursuant to Section 22(b) of the Securities Act of 1933 (15 U.S.C. §77v(b)).

In its appeal, the appellant intends to rely upon the point that the District Court, having adjudged Young to be in contempt, erred in ordering Young to pay a fine of $50 and stand committed until the fine was paid, instead of imposing a remedial penalty, calculated to coerce Young to produce or allow inspection of the books and records of the respondent pursuant to the said order of June 1, 1943.

Dated: October 2, 1945.

ROGER S. FOSTER,
Solicitor.

HOWARD A. JUDY,
Regional Administrator. [20]

G. M. CUTHBERTSON,
Attorneys for Securities and Exchange Commission. [21]

Received copy of within "Statement of Points" this 3 day of October, 1945.

MORRIS LAVINE.
By M. B. SAFIN,
Attorney for Respondent.

[Endorsed]: Filed Oct. 4, 1945. [22]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

The Securities and Exchange Commission, appellant herein, designates as the record on appeal the following portions of the record, proceedings and evidence in the civil contempt proceeding against A. W. Young, secretary-treasurer of the respondent:

1. Affidavit of Charles R. Burr of the Securities and Exchange Commission, filed January 24, 1945, in support of the rule to show cause why A. W. Young, secretary-treasurer, Penfiled Company of California, should not be adjudged in contempt, together with exhibits thereto as follows:

Exhibit A—Supplemental order of the Securities and Exchange Commission, dated January 16, 1945, directing investigation and designating officers to take testimony.

Exhibit B—Letter of Charles R. Burr to A. W. Young, dated January 16, 1945, and Order of Judge Peirson M. Hall, dated June 1, 1943.

2. Order of Judge Peirson M. Hall, dated January 23, 1945.

3. Transcript of proceedings before Judge Peirson M. Hall on February 8, 1945.

4. Order of Judge Peirson M. Hall, dated February 8, 1945. [23]

5. Transcript of proceedings before Judge Peirson M. Hall on July 2, 1945.

6. Judgment and order, entered July 2, 1945.

7. Notice of appeal filed September 26, 1945.

8. Statement of points.

9. This designation.

Dated: October 2, 1945.

ROGER S. FOSTER,
Solicitor.

HOWARD A. JUDY,
Regional Administrator.

G. M. CUTHBERTSON,
Attorneys for Securities and Exchange Commission. [24]

Received copy of within "Designation of Contents of Record on Appeal" this 3 day of October, 1945.

MORRIS LAVINE.
By M. B. SAFIN,
Attorney for Respondent.

[Endorsed]: Filed Oct. 4, 1945. [25]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 25, inclusive, contain full, true and correct copies of Affidavit In Support of Rule to Show Cause Why A. W. Young, Secretary-Treasurer, Penfield Company of California, Should Not Be Adjudged in Contempt with exhibits thereto; Order dated January 23, 1945; Order dated February 8, 1945; Minute Order Entered July 8, 1945; Notice of Appeal; Statement of Points and Designation of Record on Appeal which, together with copy of Reporter's Transcripts dated February 8, 1945, and July 2, 1945, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 1st day of November, 1945.

[Seal] EDMUND L. SMITH,
Clerk.

By THEODORE HOCKE,
Chief Deputy Clerk.

In the District Court of the United States in and for the Southern District of California, Central Division

Before the Honorable Peirson M. Hall.

No. 2863-PH—Civil

SECURITIES & EXCHANGE COMMISSION,
Plaintiff,

vs.

PENFIELD COMPANY OF CALIFORNIA, and A. W. YOUNG, Secretary-Treasurer,
Defendants.

REPORTER'S TRANSCRIPT ~~OF~~ PROCEEDINGS

Los Angeles, California
February 8, 1945

Appearances:

For the Plaintiff: J. Leonard Townsend, Assistant Solicitor, Securities and Exchange Commission; and Charles H. Carr, United States Attorney, by Homer H. Bell, Assistant United States Attorney.

For the Defendants: Morris Lavine, 619 Bartlett Bldg., Los Angeles, California, and William J. Clark, 619 South Olive Street, Los Angeles, California. [1*]

* Page numbering appearing at top of page of original Reporter's Transcript.

Los Angeles, California,

Thursday, February 8, 1945, 10 a. m.

The Court: Very well. Call the calendar.

The Clerk: 2863. Securities and Exchange Commission vs. Penfield Company of California. Hearing on order to show cause why A. W. Young, Secretary-Treasurer of the Penfield Company, should not be held in contempt of court and dealt with accordingly.

The Court: Let me see the files.

(Court examines file.) Ready in that matter?

Mr. Lavine: Yes, your Honor.

The Court: All right. And the other matter?

The Clerk: 17230. United States of America vs. the Penfield Company of California, and others. Hearings on the motion of defendant Alfred W. Young to quash subpoena duces tecum.

The Court: Ready in that matter?

Mr. Bell: Yes.

(The court at this time heard Case No. 17230, United States vs. The Penfield Company of California.)

The Court: Very well. The other matter on the calendar is the same matter under a different title.

Mr. Townsend: Do I understand, your Honor, Mr. Lavine has already expressed the position of the defendants?

The Court: I understood that he had not.

Mr. Townsend: Well, then, your Honor. [2]

The Court: At the conclusion of his remarks a

few moments ago he said that he had not. I understood him to indicate that he desired to have something further to say.

Mr. Townsend: I see.

The Court: Inasmuch as you are the moving party, I think it is your first shot at it.

Mr. Townsend: I think under these circumstances, your Honor, my statement is just to call your Honor's attention to the affidavit and the rule you issued——

The Court: Very well.

Mr. Townsend: And there being no other evidence in the matter, unless some showing as to why the rule should not issue.

Mr. Lavine: I will answer that, your Honor, that on examination it appears, as your Honor will see, there was no personal service of the rule, or of change of date, and all they did was to mail out copies of this to various parties, and some order of this last proceeding they had commenced, and under Rule 54 of the Rules of Civil Procedure for the District Courts of the United States process must be served by the United States Marshal, or his deputy, or by some person especially appointed by the court for that purpose, except a subpoena may be served as in Rule 45.

Now, of course, this is a subpoena duces tecum and I think all parties were entitled to a subpoena.

The Court: Is this a subpoena duces tecum? [3]

Mr. Lavine: No, this is a rule to show cause. No, this is not a subpoena duces tecum; originally

it was, and then it has gotten now into an order to show cause. I will submit the matter.

Mr. Townsend: I understand, do I, that is the full showing that counsel is making in response to the rule this morning?

Mr. Lavine: Yes, that is the complete issue. There is the proceeding here at this time to require us to show cause why we should not be cited for contempt; that, and the fact that the same proceedings was had by the Grand Jury requiring some documents, and it was for the purpose of an investigation, and since that time there has been returned a new indictment, all of this before your Honor, and which your Honor can take judicial notice of.

The Court: Rule 54? In other words, you maintain this is a process?

Mr. Lavine: Yes.

The Court: That the order is a process?

Mr. Lavine: Yes, this last order is a process.

The Court: That is the order of this court dated June 1, 1943?

Mr. Lavine: No, that is not a process, your Honor. I do not maintain that.

The Court: That is the order which directed the Penfiled Company to produce its books and records and make [4] them available.

Mr. Lavine: That is right, as of a certain date, your Honor.

The Court: From which an appeal was taken?

Mr. Lavine: From which an appeal was taken.

The Court: Now, let me see.

Mr. Lavine: And then your Honor stayed the order pending the appeal. Your Honor granted the stay and bond was put up and there was a stay granted. That was on entire appeal. Now, they come back here and certainly that order cannot be complied with as of that date and of that time.

The Court: Then there is the change in adjournment thereof as determined by said officer or employee of the Securities and Exchange Commission. Now, I stayed the order, and I stayed it pending the determination on appeal.

Mr. Lavine: The mandate on appeal was filed December 7, 1944. The affidavit in support of the rule to show cause shows that on January 16, 1945, the order of investigation of the Commission was further amended by the designation of Mr. Burr, the affiant. Does it show who designated him in this?

Mr. Townsend: Designated whom, and for what, your Honor?

The Court: For disclosure of the information desired.

Mr. Townsend: And you will find attached to the affidavit, your Honor, a letter over Mr. Burr's signature addressed to the company, specifically to Mr. Young, in [5] which Mr. Burr informed the company that he would present himself at the office of the company——

The Court: On January 24, 1945.

Mr. Townsend: That is right. Yes, your Honor. And access to the books was refused.

The Court: Let me see, Mr. Lavine, let me fol-

low you further. Your contention is not, therefore, that the affidavit of June 1, 1945, nor the letter making the continuance, is a process? Your contention is not that they are a process?

Mr. Lavine: No.

The Court: You do not contend they are a process?

Mr. Lavine: No.

The Court: Now, what do you contend is the process which was required to be served by the marshal, the order to show cause?

Mr. Lavine: Yes, the order to show cause and the order of Mr. Burr, or some officer of the Commission, which he merely stated by means of a letter.

The Court: Which order of Mr. Burr? The letter just referred to?

Mr. Lavine: Of January 16, 1945.

The Court: I do not believe that that could be considered a process. There was the order of June 1, 1943, fixing the date of the 8th of June, 1943, and any adjournment thereof as determined by said officer or employee to [6] produce the full books and papers and records. As I indicated, I stayed that order pending appeal, and until after the mandate was signed this order could not be effective; after the mandate was signed, of course, June 8, 1943, had long since expired, and under the terms of this there would have to be another date either fixed by virtue of an adjournment, so-called, or a fixed inquiry, because otherwise the order of the court could be completely thwarted by merely taking an appeal. That day went by. Consequently, this

date of this letter of January 16, 1945, it seems to me could not, under any circumstances be held to be a process. It is merely a notice of the date of the adjournment of the original day of June 8, 1943. So I will hold against you on that point.

Now, what is your other point as to what is process? That the order to show cause here is process?

Mr. Lavine: Yes, your Honor. This is a proceeding in contempt, your Honor.

The Court: This is not yet a proceeding in contempt.

Mr. Lavine: No, just for an order to show cause.

The Court: I suggest to Mr. Townsend that in matters such as these, I consider it better practice, in civil matters, to make a motion for a rule to show cause why an order to show cause for contempt should not be granted. If you will observe, the order as originaly presented was changed so that, in fact, now it is nothing more than a [7] motion for a rule to show cause. As this order reads, he appeared before the court on this date, which was the 5th, and it was continued to the 8th, to show cause, if any there be, why a further order should not be made on A. W. Young holding the said Young in contempt of this court. Nowhere is it stated it is in the nature of a motion for a rule to show cause, which in my opinion, is the better practice, so I do not and I cannot hold with you that this is a process. If the order to show cause for contempt issues as a result of this motion, that, in my judgment, would be a process

and would be required to be served by the marshal, as it would be the institution of criminal proceeding.

Mr. Lavine: That is my misunderstanding of the nature of the proceeding, as I saw the original papers and did not see what I thought was the original order, or original motion.

The Court: All right. And now, if I hold against you on that point, what other point have you to make?

Mr. Lavine: I have this to say, your Honor, in respect to that matter. The case of Walling vs. United States, which was decided by this Circuit, holds an investigation by the Securities and Exchange Commission is similar in effect and purpose to that of a grand jury investigation. The Securities and Exchange Commission commenced this investigation and then apparently turned the matter over to the United States District Attorney. I think, for the purpose [8] of securing the identical document, papers, and so forth, which the records before your Honor show were sought by the Grand Jury. Now, they have had the return of the indictment based upon the showing which was made before the Grand Jury and in which it was claimed these papers and documents were sought to be had. And then, before the Circuit Court the appellant, in opposition, requested for time to petition for a writ of certiorari, and the Securities and Exchange Commission set forth it was for the purpose of having an indictment returned, as I recall it, or for the purpose of concluding their investigation be-

fore October 5, 1941, that the particular books, papers, records or documents were sought. They are the ones that have been sought, the identical ones, that have been sought, in all of these proceedings. They are general, and include all the records, books, and papers, and there can be no purpose now in the Securities and Exchange Commission seeking them, other than to secure evidence for the trial in the identical case in which they were sought. And I submit under those circumstances that they should not be permitted now to conduct an investigation that has been concluded by the return of the indictment, under which all of these defendants are now under indictment. That is all, your Honor, I have to say.

Mr. Townsend: May it please the court, because this is perhaps the only chance I will have—— [9]

The Court: You have been admitted specially to appear in this case, or are you a member of the Bar here?

Mr. Townsend: I am not a member of the Bar here, and I have never appeared or had any motion to be admitted in any District Court here before, but if your Honor wishes that——

The Court: Well, I think perhaps to avoid any possible question in that connection, I will entertain a motion, Mr. Bell.

Mr. Lavine: I will raise no objections, your Honor.

The Court: I think the record had better be straight.

Mr. Bell: Your Honor, I move the admission of

Mr. Leonard Townsend for the special purpose of handling this matter which is now pending before your Honor.

The Court: Mr. Townsend is a member of the Bar of what state?

Mr. Townsend: The District of Columbia, your Honor, Maryland, and a member of the Bar of the Supreme Court.

The Court: Very well. Mr. Townsend is admitted specially for the purpose of this case, or this order, or this hearing.

Mr. Townsend: I think this hearing.

The Court: This hearing.

Mr. Townsend: Yes.

The Court: All right. You may proceed.

Mr. Townsend: Inasmuch as this is probably the only [10] time I shall be before your Honor on this matter regardless of the outcome of the present proceedings, and as it was intended that I should have been associated in this matter until completion, I felt that perhaps a more extended set of remarks might be in order, and I ask your indulgence for that purpose.

I am particularly impelled to do so by virtue of two things your Honor has said this morning, the first of which is that the proceeding that the Securities and Exchange Commission has instituted here looks toward a criminal proceeding.

The Court: I don't know that I said that, but if I did it is obvious that it does.

Mr. Townsend: I am going to address myself to that in particular, may it please your Honor.

The Court: All right.

Mr. Townsend: The second proposition your Honor just enunciated was that a rule to show cause in a proceeding that we are appearing in would be in the nature of a process and required to be served. I shall respectfully attempt to dissuade your Honor from both those points of view, and I think that can be done very shortly.

Let it be said at the outset that what we are after here is the enforcement of your Honor's order entered almost two years ago and still unobeyed, notwithstanding the fact, your Honor that it has been successfully affirmed [11] at every step and every level of the federal judiciary. That case was very clear may it please the court, that in a proceeding brought to enforce a court's order where the object sought is to compel compliance, there would be no question at all but that the proceeding to that end is purely remedial and, therefore civil in nature.

There are three cases that have arisen in this jurisdiction which are leading cases all over the country on that subject, your Honor. They are the case of McCrone vs. United States; still another, Clarke vs. Federal Trade Commission; and a recent case, Fenton vs. Walling; all of which I am sure your Honor has read.

The Court: I don't remember them. Don't take anything for granted when you are arguing with me.

Mr. Townsend: I am proposing to go into it completley.

The Court: All right.

Mr. Townsend: In the McCrone case, which was affirmed by the Supreme Court——

The Court: What is the citation of the McCrone case?

Mr. Townsend: That is 307 U.S., at page 61; and it is in the Ninth Circuit Court of Appeals at 100 Fed. (2d), page 322. Now, in that case, your Honor,——

The Court: Let's get them in here. The bailiff will bring them in.

Mr. Townsend: All right. There are lots of them on this subject. [12]

The Court: The second one that you mentioned is?

Mr. Townsend: Clarke vs. Federal Trade Commission.

The Court: Clarke?

Mr. Townsend: Clarke. 128 Fed. (2d) at 542.

The Court: And the third one?

Mr. Townsend: Fenton vs. Walling. Just a moment, your Honor. That is in 139 Fed. (2d) at 608. Certiorari was denied in 321 U.S.

The Court: Will you get me 307 U.S., 128 Fed. (2d) and 139 Fed. (2d)?

Mr. Townsend: In this case, your Honor, the Circuit Court of Appeals in this Circuit, and the Supreme Court of the United States said, in substance, this: There should be no difficulty in distinguishing between so-called civil and so-called criminal contempts. And the test is a simple one. If what is sought in the one instance is for the bene-

fit of one of the parties to the action, and is for that purpose alone, it is a civil contempt; if there be any such purpose, or if it partake of that purpose, and yet be for the purpose of presenting contumely before the courts, and is particularly in the public interest to see that that should not happen, then it is a criminal case and instituted through criminal proceedings.

The Court: The Securities and Exchange Commission does not operate for itself, does it? I mean it operates in the public interest, doesn't it? [13].

Mr. Townsend: It does, indeed, your Honor. Now, in this case we are most emphatically urging upon your Honor that our purpose in being here is to enforce your order and nothing else. In this type of case, the proceedings, as the courts have said time and time again, result in a commitment of a party, and that party carries with him into the jail house the keys to that jail, meaning thereby that when he chooses to obey the court's order he can open the doors and walk out a free man.

The Court: If those are the terms of the order.

Mr. Townsend: Assuming that is the usual form in the case. We have here the usual form in each of the cases I am now about to speak of.

Now, let's consider the McCrone case, your Honor. There an Internal Revenue investigation was under way, a subpoena was directed to a person to appear to testify, but the person refused to testify; application was made to the District Court, and the District Court entered an order as your Honor did in this case, directing the person to

appear and testify. He continued to refuse. A rule to show cause was issued why he should not be adjudged in contempt. He was adjudged in contempt and committed until he should purge himself. The Circuit Court of Appeals for the Ninth Circuit affirmed; so did the Supreme Court. The Supreme Court said this, your Honor, among other things:

"While particular acts do not always lend [14] themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrant to offenses against the public."

Now, that quotation is one of the most familiar ones in the law on contempt, your Honor, because it is particularly a paraphrase, as some of them are, of the decision of the United States Supreme Court in the case of Gompers vs. Bucks Stove & Range Company, 221 U.S. 418, and I would like to read, your Honor, what the Supreme Court has said in discussing the matter in that case. It said this:

"* * * It is true that punishment by imprisonment may be remedial as well as punitive and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is in-

tended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases [15] is that the defendant stand committed unless and until he performs the affirmative act required by the court's order."

Now, in the Clarke case, your Honor, we have a different agency, the Federal Trade Commission, and the same pattern was before one of the judges of this district; as I remember it, Judge Harrison. There was a subpoena by the agency; a refusal to testify; an order of the court directing testimony; refusal to obey the order; a rule to show cause; a commitment for contempt; and a sustaining of the case in the Ninth Circuit Court of Appeals on the ground that the only question in the case is, has the order been obeyed.

The Fenton case is another subpoena case. It was a case in which the court exercised its powers under the discovery provisions of the new Rules of Civil Procedure; discovery was ordered; subpoena issued, and subpoena disobeyed; the court found after a rule to show cause that the complainant was entitled to an order of contempt until the disobeying person had complied with the order and had purged his conduct.

So let there be no mistake of what our position is, that this is a civil proceeding, a civil one, and if the time should arrive when this court orders its original order to be enforced by a committing order, it is still in nature, and never gets to the stage of a criminal proceeding in this particular instance.

Now, the second proposition I want to address myself to is the question of whether a rule to show cause for civil contempt is process and required by its terms to be served personally upon the defendant, and, in connection therewith let me call your Honor's attention to the cases which have already decided that question.

In National Labor Relations Board vs. Hopwood Retinning Company, and that is to be found in 104 Fed. (2d), page 302, decided by the Second District Court of Appeals, the Second Circuit was called upon to enforce an order of enforcement which it had theretofore granted at the behest of the National Labor Relations Board. In the course of the proceedings holding the respondents in contempt, the Circuit Court of Appeals said this:

"As a proceeding for civil contempt, this is therefore properly a continuance of the earlier action in this court, and is a step in the enforcement of our previous judgment. Hence it was correctly instituted by motion served upon the counsel appearing for the parties in the record."

I can cite your Honor to another District Court case in the District of Columbia, which happens to be my bailiwick.

The Court: Well, that is reasonable authority.

Mr. Townsend: Thank you, your Honor, on behalf of the judges there. In that jurisdiction, your Honor, we have—— [17]

The Court: What is the citation?

Mr. Townsend: I will have to get it. It is right

here. Tilgham vs. Tilgham, contained in 47 Fed. Supp. at page 417.

The Court: 57?.

Mr. Townsend: Fed. Supp., at 417.

The Court: What is the current one, is it?

Mr. Townsend: Yes, your Honor.

The Court: What kind of a case was it? It sounds like a divorce case.

Mr. Townsend: I was about to say to your Honor, that in our jurisdiction, in Washington, they exercise general jurisdiction over local matters. In this case the show cause order for contempt had been entered and it had been disobeyed. The rule in our jurisdiction is that in such cases service on non-residents may be had by publication and the order for a rule to show cause was serve by a Deputy United States Marshal on the man in an entirely different jurisdiction. Judge Pine in that case held that such a proceeding was wholly remedial in aid of this order, held it was civil in nature and would not have to be served under the new rule of notice to counsel.

The Court: In any event, the rule is different in California.

Mr. Townsend: In the Federal Court?

The Court: In the California courts, in the State [18] courts.

Mr. Townsend: Now, I want to get back to the main track, so to speak.

The Court: Well, you can still have process in a civil action, can you not?

Mr. Townsend: I would suppose this, your Honor,——

The Court: Is the original summons a process?

Mr. Townsend: Yes, the original summons is a process. It must be served. There is no question about that.

The Court: Is there anything else in a civil action that is process?

Mr. Townsend: I don't know of anything your Honor.

The Court: Why should the rule say that service of all process shall be made by the Marshal or his Deputy except that a subpoena may be served as in Rule 45? Now, it indicates the subpoena is process, and it certainly is process if it is a requirement by the court.

Mr. Townsend: I don't read the rules in the same way. As a matter of fact, your Honor will remember when I presented the preliminary rule before you it was my position that, being a preliminary step of a rule to show cause as to why a rule to show cause should issue in a case was probably not, in our judgment, consonant with the new rules.

The Court: I understand.

Mr. Townsend: It is our position a simple motion [19] under the new rules to adjudge in contempt is the appropriate proceeding today, and could be set down even under the five-day rule, but we desired counsel to have adequate opportunity, and hence we followed the longer period and used the other proceeding. Now, getting to the merits of this thing, your Honor——

The Court: Pardon me. Let me ask you another questiton, at this point.

Mr. Townsend: Yes, your Honor.

The Court: Assuming the rule to show cause was issued and trial was had and the defendant was found in contempt, would the Court have any power to punish him, say, fine him and put him in jail for disobedience of the order?

Mr. Townsend: In a civil proceeding I think your Honor has the power to punish him, without doubt; you can punish him by fine or by imprisonment, and I have some cases I think your Honor will find interesting on the question that you have no discretion to deny it if the order issued or if the showing it made that the order has not been obeyed.

The Court: In other words, in the event I find the failure to comply, that the court is compelled arbitrarily to require him to comply?

Mr. Townsend: I think that is the substance of the opinions, your Honor.

There has been much attempt by Mr. Irvine, and I [20] think by Mr. Clark, to inject into these proceedings what may be called an argument touching the equities of the situation. I think it hardly falls with any grace from their lips to urge that upon this Court. Certainly there is no timely ground for failing to obey an order almost two years old, and certainly no legal one that I have heard any authority about. It would seem to indicate that a complete and apparently bland disregard of this Court's order. But, however that may be, I suppose the Supreme Court has many times, as your

Honor knows, said that the civil rights of citizens under the Constitution come first and so long as they may properly involve his civil rights it is better perhaps, that some person should escape the penalty of the law, than that the Constitution should be thwarted in its benevolent purpose. And so I say properly, and perhaps justifiably in my own mind, we have had the successive levels of this appeal, even though it has been pointed out, your Honor, that every one of the propositions that have been urged in the Appellate Court had been already decided, as was pointed out in the opinion and had been set at rest in previous actions of the Court. However, as I say, perhaps this presumption is to be indulged under the circumstances and may be they were seeking the right of review and not intending to delay a lawful investigation. But it seems to me, your Honor, that when once the parties have exhausted those rights that are guaranteed them under our [21] system of government and have, beyond that point, undertaken blandly to disobey your order, that then that clears everything that has preceded it, and it ought, by all the rules it seems to us, to call for the strong right arm of this Court, and to use, if I may so express it, the sword of Damocles to put an end to these pious judicial utterances. We didn't come into this court——

The Court: Which pious judicial utterances do you refer to?

Mr. Townsend: To the ones that there should be no order in this case enforcing your Honor's

order because this has happened, or that has happened, or there has been no rule, or there has been no service.

The Court: You mean the judicial remarks of this Court?

Mr. Townsend: No, your Honor. I mean the remarks of counsel. Your Honor, we did not come before you two years ago in a vain hope. We came in a judicial cause authorized under the law and we got an order from your Honor. It is still the order of this court, and I respectfully submit that your Honor should strictly enforce that order. There are principles and reasons here now which indicate if it is not enforced soon, may it please the Court, this whole purpose may be completely negatived.

Your Honor can see from the original petition which was filed before you nearly two years ago that the order of [22] the Securities & Exchange Commission, under which the enforcement of these proceedings was begun, was commenced in May of 1942. Now, the Statute of Limitations in the Securities Act of 1933 is three years.

The Court: In a criminal proceeding?

Mr. Townsend: Yes, your Honor, in a criminal proceeding.

The Court: And the purpose of the subpoena is, as I remarked, obviously for the purpose of getting information in relation to a possible criminal proceeding?

Mr. Townsend: Possibly, or possibly a civil proceedings, or an administrative proceeding.

The Court: Is there a three year statute on civil proceedings?

Mr. Townsend: There is no statute on that.

The Court: Any statute on administrative proceedings?

Mr. Townsend: No.

The Court: Then the urgency here lies only in connection with a possible criminal proceeding?

Mr. Townsend: That may very well be said to be just the situation, your Honor.

The Court: All right.

Mr. Townsend: As I say, the order of the Commission, under which these proceedings were instituted, began in May of 1942. We have a bare four months in which to develop any facts that the Commission may desire in connection [23] with its regular proceeding, if the provisions of the Act are going to be accorded their full weight. But quite apart from that, your Honor,——

The Court: Let me ask in that connection the Securities & Exchange Commission does not ignore the fact that there is an indictment here, does it?

Mr. Townsend: I don't know what you mean when you say "ignore", your Honor.

The Court: You know what "ignore" means, don't you?

Mr. Townsend: Yes, sir, I do. I don't understand exactly. You see, we did not institute the Grand Jury proceedings.

The Court: Oh, I understand that. But I mean the Securities & Exchange Commission is a part

of the same government for which the United States Attorney acts.

Mr. Townsend: Yes, your Honor.

The Court: Yes. And there is an indictment?

Mr. Townsend: There is.

The Court: A criminal indictment?

Mr. Townsend: There is.

The Court: For violation of the Securities & Exchange Act.

Mr. Townsend: That is right, your Honor.

The Court: All right. Now, what I mean to say is this: the Securities & Exchange Commission is seeking further [24] information or further evidence concerning a possible violation, knowing and generally ignoring that you do have an indictment?

Mr. Townsend: We certainly did know we have an indictment, your Honor;

The Court: In other words, you feel there may be other and further violations by the same defendants?

Mr. Townsend: Yes, that is the purpose of this investigation, your Honor. And possibly other defendants.

The Court: I see.

Mr. Townsend: In other words, we felt at the time that the matter was referred to the Attorney General under our statutory provisions that the investigation as to the matters that we then had evidence concerning could not wait, so that all the evidence we then had we took to the Attorney General.

The Court: That preserved the statute of limitations, by the indictment?

Mr. Townsend: No question about that, your Honor.

The Court: Yes, I see. So that under the law your inquiry actually would be concerning violations of the law committed since that time?

Mr. Townsend: Committed since when?

The Court: Since the return of the indictment.

Mr. Townsend: Yes, that is right.

The Court: So that that urgency is not as immediate [25] as it was before the indictment was returned.

Mr. Townsend: I don't know if this is what your Honor means and you will pardon me if I try to make it clear. If your Honor is saying we are not concerned in our present investigation with the development of fact touching upon that, the answer to that is yes, we are not concerned with that possibility. We are concerned with the problem of completing an investigation lawfully commenced, touching upon a wide range of matters, most of which, if I may say so to this Court, have not yet been concluded, and cannot be successfully concluded until such time as we have access to the books for the purpose of concluding it.

Your Honor seemed interested in the cases in connection with the subject of the discretionary powers of the Court, if any, in these matters. I have two cases I think your Honor will find conclusive. One of them is Ingraham Company vs.

Germanow, contained in 4 Fed. (2d), page 1002. Now, that case, your Honor, was decided——

The Court: Wait a minute. 4 Fed. 2nd, 1002?

Mr. Townsend: Yes. That case was decided by the Second Circuit Court of Appeals, and it illustrates I think far more amply than my humble reasoning could how important it is that orders of a Court once entered should be considered sacrosanct and enforced to the very letter at all times. And let me point out before I discuss that case, your Honor, that in the case I am about to mention the unusual [26] fact is that the opinion of the Second Circuit concerned itself with purely private rights, as distinguished from the very one of public interest we think is embraced in this case.

In the Ingraham case, your Honor, Ingraham, the Plaintiff, had started some litigation over a patent. During the course of the litigation in the District Court it was stipulated between the plaintiffs to that suit that Claims 3 and 4 of the patent in litigation were valid and a consent decree enjoining any violation of any infringing on those Claims should be entered; and it was entered. Subsequently, your Honor, the plaintiff in the first case brought suit against defendants in a second case, but different defendants and brought suit on the same patent and the defendants brought in the second case litigated the propriety or the correctness of the Claims 3 and 4 and the Second Circuit Court of Appeals ultimately invalidated those Claims.

Now, immediately a second order was entered

validating Claims 3 and 4, the defendants in the first case ceased to consider themselves bound by the terms of the consent injunction; whereupon the plaintiff brought a proceeding in contempt of his original case and the lower court having called to its attention the opinion invalidating Claims 3 and 4, refused to commit and an appeal was taken by the plaintiff in the first case. The Second Circuit Court of [27] Appeals, after holding that the consent decree was an estoppel, used this important language:

"While the decree stands they,"—that is, the defendants—"must obey it, and the plaintiff is entitled to the usual sanctions for its enforcement."

And order of contempt was issued and in the second case damages were awarded the plaintiff for civil contempt to the fullest extent that he would have been entitled to such damages had there been no second suit invalidating these Claims, and such order was affirmed on appeal.

I cite your Honor Judge Woolsey's opinion in the District Court for the Southern District of New York, in a comparable case, entitled "In Re Sylvester" to be found in 41 Fed. (2d), at page 235.

The Court: 245?

Mr. Townsend: 235, 41 Fed. (2d). This language was used, and following it Judge Woolsey cited the Ingraham case as his authority.

"In a civil contempt punishment is not discretionary because the object is remedial, and the party invoking the court's aid on the contempt has the right to its remedy."

Your Honor, there has been no showing in this case, none at all, on any factual situation, which goes to the question of why the respondent here has not complied with [28] your order. There is not in this record one scintilla of evidence by affidavit or any other form from the mouth of Mr. Young, and he may be here, in answer to your rule, why he has not complied with your Honor's order. There is an affidavit in the record, your Honor, that we have asked him to comply with your order, either the Company or Mr. Young, and they have not done so.

Now, under these circumstances, your Honor, we certainly submit that the strongest possible case should be made out in our favor. But what is urged upon your Honor? It is urged that there has been an indictment. That raises a question that to me, and I think to the courts, and I hope ultimately to your Honor, will be absolutely irrelevant to the question before you, and let me try to convince you that is so. In the case of Oriel vs. Russell in the Supreme Court of the United States, your Honor, the proposition was laid down, as to a civil contempt for failure to obey an order of the court, that on the contempt proceeding itself the Court is limited to the reception of only such evidence as goes to the question of the ability or inability of the person who has been commanded by an order to do what the order said. Let me read you the very intelligent language of the Supreme Court on that question:

The Court: Well, that is generally the law, the

event that they might have ability or inability to obey. Of course, that is a very broad term. I have heard hundreds [29] of contempt matters in alimony cases, and that is the general rule. In a few words I would say it is ability or inability. Now, ability or inability might involve a lot of things; it might involve any number of things. It might be a legal inability. In fact, it might be so many things, particularly, things that affect people's lives. But generally that is the rule, the ability or inability to comply with the order.

Mr. Townsend: I want to make sure——

The Court: If there is an intervening right, well, then I think the Court can take that into consideration, too.

Mr. Townsend: Intervening right of what?

The Court: Some order or judgment, or something which affects the situation, which intervenes and affects the rights of the parties. I think the Court can take that into consideration.

Mr. Townsend: I am sorry to say I fail to follow it. It is probably because I am——

The Court: You go ahead with your argument. It is immaterial anyhow.

Mr. Townsend: I am arguing the proposition that the only thing that this court should take into consideration this morning, in answer to this rule, is whether the defendant Young has the books in his possession. I say to your Honor—— [30]

The Court: Not this morning, because when the contempt comes up that will be the time to consider that, if the rule is issued.

Mr. Townsend: All right, your Honor. Yes, when he is called before you for contempt. [31]

The Court: Yes.

Mr. Townsend: I think it is important, your Honor, and I stress and emphasize the point I am trying so hard to make, as to this business about an indictment or any intervening happening, that that has just as much weight, in accordance with the Supreme Court decision which I am about to read from, as if the defendant just said, "I do not want to comply with the order." Now, I may be wrong; but I don't think so.

The Court: That might be true as to corporate books. I would seriously doubt that being true as to any individual's books and papers.

Mr. Townsend: I make that statement recognizing the distinction your Honor is making, yes. This was a turnover of certain books in bankruptcy and the question was has one the right to be supported by clear and convincing evidence, and then the court says, when the lower court decided that the order should be entered it should have before it the kind of clear and convincing evidence that it speaks of, and then it goes on:

"The Referee and the Court in passing on the issue under such a turnover motion should therefore require clear evidence of the justice of such an order before it is made. Being made, it should be given weight in future proceedings as one that may not be collaterally attacked by an effort [32] to try over the issue already heard and decided at the turnover. Thereafter on the motion for com-

mitment the only evidence that can be considered is the evidence of something that has happened since the turnover order was made showing that since that time there has newly arisen an inability on the part of the bankrupt to comply with the turnover order."

The Court: Did Judge Taft write that decision, Mr. Townsend?

Mr. Townsend: Yes, he did, your Honor, yes.

The Court: And doesn't he say along toward the end there that the contempt proceeding there is in the nature of a criminal contempt?

Mr. Townsend: If he does, I don't know how he could possibly say it when he just got through saying the order was coercive in nature, but let us find out. It says:

"A turnover order must be regarded as a real and serious step in the bankruptcy proceedings and should be promptly followed by commitment unless the bankrupt can show a change of situation after the turnover order relieving him from compliance."

He says:

"The proceedings in these two cases have been so long drawn out by efforts on the part of the bankrupts to retry the issues presented on the [33] motion to turn over as to be, of themselves, convincing argument that if the bankruptcy statute is not to be frittered away in countless delays and failures of enforcement of lawful orders, the rule we have laid down is the proper one."

Then here Justice Taft quotes from the Compers case, which holds it is a civil case, your Honor.

The Court: It is immaterial. My inquiry there was not of any meaning. I remember the case in connection with bankruptcy turnover orders.

Mr. Townsend: Let us suppose we didn't have the case. Let us say we get right down to the question of what Mr. Lavine has presented here as his only argument as to why the rule should not issue. What was it he said? That there was an indictment since the order was entered. Now, I am going to cite your Honor cases right on that very proposition and the first one is one involving the Securities and Exchange Act of 1933, raised in the Circuit Court of Appeals.

The Court: Go ahead.

Mr. Townsend: Your Honor, I should like to cite you the case of In re Verser-Clay Company, in 98 Fed. (2d) page 859.

The Court: That is in what book?

Mr. Townsend: 98 Fed. (2d), and certiorari in this [34] case was denied, may it please the Court.

The Court: And what is the name?

Mr. Townsend: The title of the case is In re Verser-Clay Company.

The Court: On what point do you cite that?

Mr. Townsend: That is on the point that the intervention of an indictment——

The Court: All right.

Mr. Townsend: ——is no bar to enforcing your order. There is no need going into the fact because the opinion is very short and states the facts very concisely and they are as follows:

This is by Justice Lewis of the Circuit Court:

"Clay says he relies on the Fifth Article of Amendment to the United States Constitution, U.S.C.A. Const. Amend. 5:

"'No person * * * shall be compelled in any criminal case to be a witness against himself.'

"He further says that he and Mr. Verser have been indicted in the United States Court for the District of Columbia for criminal offenses described in said Sections 5 and 17 of the Securities Act, and that the object of the Commission and its officers is to obtain from him proof of their guilt and use it against them in that prosecution or use it in finding other indictments, and that the [35] production of the books alone might disclose such incriminating facts and he believes they would But Clay cannot claim the constitutional privilege for acts of the corporation."

Citing Wilson vs. United States, and citing several other cases; Wheeler vs. United States; Grant vs. United States; Brown vs. United States; Essgee Company vs. United States; all Supreme Court cases, as your Honor knows. (Continuing):

"It may be true that there is something in the corporate books and documents that shows personal acts of Clay that tend to incriminate him. If so, he had an opportunity to present them to the District Judge and ask that he be protected in his constitutional rights; but he sought no protection in that respect. It is not claimed that when he was on the witness stand any question was asked the answer to which would tend to incriminate him.

Clearly the privilege asserted by him does not extend to the two corporations."

Now, your Honor, if that does not dispose of the contention of Mr. Lavine then I am at a loss to know what possibly could, but just on the chance your Honor might wish to consult further the authorities——

The Court: I think the law is very clear about the books and records of a corporation. I think, however, there [36] is still a field of the law where it is just a little unsettled, according to the Supreme Court decisions, about the incrimination of an individual in connection with books and records of a corporation. I am just saying that now more or less from a philosophical viewpoint. I don't know that it is of particular application here, although it might be, because you seek to hold A. W. Young, an individual, in contempt. As indicated by the last remark, there seems to be some field where an individual is entitled to protection. For instance, the Court there says, if he needed protection he should have applied to the District Court for protection.

Mr. Townsend: I have no quarrel with the proposition, your Honor.

The Court: Just how far or just where that goes, I don't know. I was unable to decide as a prosecutor when the question was presented from time to time, and I am still at a little bit of a loss as a Judge as to just where that field begins and ends, but I believe it does exist.

Mr. Townsend: Your Honor, with all due deference, I certainly submit the question, and I think in connection with the matter of compelling an officer of a corporation to produce books of a corporation in the event of a criminal indictment, or otherwise, that matter has been very completely covered.

The Court: Oh, I think that is true, but some place [37] along the line, as they indicate from time to time, and as the Supreme Court recently indicated in the case where they had some labor union officer up——

Mr. Townsend: That is one of the C.I.O. cases?

The Court: In any event, he had charge of the books and records of the corporation and refused to testify, and they held he had to turn over the books of the corporation, but they went on to indicate, not by exact language, but rather by their discussion, that some place along the line there might arise the question of this man's right not to incriminate himself.

Mr. Townsend: The question of whether or not he can be compelled to incriminate himself is not even involved in this proceeding, nor should it be, but assuming for the purposes of the present discussion that it is, certainly the area of that protection, whatever it may be, can extend no further than to his personal and private memoranda, papers and documents, and we do not want his personal, private papers, documents, or memoranda. And your Honor has not issued any such order in this case. On the contrary, we do want, your Honor,

what all the courts have said we are entitled to, the books of the corporation, which, under the law, must be supplied under a proper subpoena.

Now, your Honor, I do intend to draw even more on the authorities in support of the proposition that the intervention of the indictment in these proceedings can have no [38] force or effect upon the matters that are before you in this civil matter. Take the case of Sinclair vs. United States, back in the days when the Senate was investigating the Teapot Dome oil leases. Mr. Sinclair and his corporation were the subject of a grand jury inquiry. They were also the subject of civil suits instituted at the behest of the Attorney General to recover huge sums alleged to be due and owing to the government. While these things were happening, your Honor, the Senate, in investigating it, issued a subpoena to Mr. Sinclair compelling him to testify, or calling for him to testify. He appeared before the Committee and was sworn, and it was then urged upon the Committee that all that this proceeding was intended for was to enable the Government to get some evidence to help it in either or both of its proceedings, criminal and civil in nature. The Committee overruled this objection, asked the question and the witness refused to testify, whereupon he was proceeded against under the applicable statute, and his conviction of the offense was appealed. The Supreme Court, in negativing it adopted this rule, if the subpoena is issued in aid of a lawful authority, it cannot be negatived by other considerations; and, therefore, said the

Supreme Court, all we are interested in in this proceeding is, did the Committee and Congress have the authority to have that testimony. It is true, said the Supreme Court, Congress has no authority per se to conduct merely private [39] inquiries in aid of litigation or anything else, so if that was the authority that was asserted, it could not be sustained, but Congress did have the authority, said the Court, to look into the question of these oil situations, look into the obtaining and enactment of legislation in connection therewith, and then the Supreme Court said that the subpoena should have been complied with and that this intervention of different things had no application.

Probably it has happened even in this court, although I am not sure that it has, but it has happened in many district courts, and has been affirmed in many Circuit Courts of Appeal, where we have the analogy of the application of the bankrupt statute, where under one section of the law the trustees are enabled or authorized to proceed to collect funds for the benefit of the estate, and another law gives the trustees the right to subpoena witnesses and to conduct an interrogation into the affairs of the bankrupt. Those cases have uniformly held, your Honor, that the fact that a suit has intervened since the man has been called to give testimony as to those matters, does not change the fact that a suit has intervened since the man has been called to give testimony as to those matters, does not change the fact that the authority exists under the statute to compel the interrogation.

Let me cite you the language of the Circuit Court of Appeals of the Second Circuit, in In re Paramount Publix [40] Corporation. That is to be found in 82 Fed. (2d) at page 230, and the Court said:

"There is a controversy here, however, as to (a) whether the estate is still in the process of administration, and (b) whether the order was improper as granted for the sole purpose of enabling the trustees to prepare their pending suits for trial.

"The estate is still in the process of administration. The Court still retains control over an important asset of the estate, namely, the causes of action set up in the three suits. Section 77B(h) of the Bankruptcy Act (11 USCA, 207 (h)) provides: 'Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, if any * * * and causing the case.' See, also, section 2(8) of the act (11 USCA, 11 (8)), giving the bankruptcy court jurisdiction to 'close estates, whenever it appears that they have been fully administered by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered.' These sections contemplate a distinction between the conclusion of the administration of the estate and a formal closing of the estate. There can be a time when the estate is [41] fully administered and yet not closed. Thus the statement in Skubinsky vs. Bodek," citing authorities—"985, 19 Ann. Cas. 1035, that a witness may

be summoned any time after the commencement of proceedings until the estate is closed by order of the court may go too far. However, as long as there is an asset, tangible or intangible in the court's control, the estate may be considered to be in administration. In Bilafsky vs. Abraham, 183 Mass. 401, 67 N.E. 318, an estate was held not to be fully administered under the section last quoted above while the bankrupt had a cause of action not realized upon, and although the estate had been closed, proceedings were reopened to prosecute suit for the benefit of the estate. Stephan vs. Merchants' Collateral Corp., 256 N.Y. 418, 176 N.E. 824, similarly outlined the reopening of an estate as the proper procedure for prosecuting a claim of the bankrupt existant at the time of the closing. This Court, in re Schreiber, 23 F. (2d) 428, likewise allowed the reopening of an estate where the bankrupt at the time of closing had an asset consisting of a claim to tax refund. These cases allowing an estate to be reopened, proceeded on the ground that the estate was not fully administered while there was a valid cause of action [42] in favor of the bankrupt. A like situation prevails here. There are assets of the estate outstanding and in the court's control. Trustees are obligated to collect these assets under the direction of the court by Section 47a (2) of the Bankruptcy Act, as amended (11 U.S.C.A. 75(a) (2)), and until its duty is discharged and the assets collected are out of the court's hands, the estate is still in administration. In re J.A.M.A. Realty Corporation (CCA) 79 F.

(2d) 546, holds nothing to the contrary. Anything supporting the appellant's position which can be taken from that case must be regarded as a dictum.

"The appellant's position, that the test of whether the estate is in the process of administration must be determined entirely by the status of the plan for distribution of the assets to the creditors, is not adaptable to 77B proceedings. This statute contemplates continuation of the business and payments by securities of the debtor. The payment of the proceeds of these suits to the debtor will benefit the corporation by strengthening its financial position and its security holders will be correspondingly helped.

"As to the second question, the appellant relies upon a quotation from In re Fixen & Company, [43] (D.C.S.D. Cal.) 96 F. 748, 755: 'The examinations thus provided for are not intended as a means of producing testimony pertinent to issues then on trial, but their object is to afford to the creditors, and the officer charged with administering the trust, full information touching the bankrupt's estate in order that necessary steps may be taken for its possession and preservation.' This rule may provide a workable distinction where the issues then on trial are not concerned with recovery of or realization upon the property of the bankrupt."

Citing other authorities, your Honor.

"But even the Fixen case says: 'The purpose of the statute seems to be, by a thorough investigation of the case, and an appeal to the conscience

of the party suspected, to enable the assignees to judge whether they will proceed to claim such property for the general creditors, and to obtain evidence to aid them in prosecuting such claim.' To allow an investigation to discover what property the bankrupt might have, and still to disallow an examination where the process of recovery on a claim has gotten under way, would be an absurd result." [44]

Take our situation, your Honor. We have started in to do a thorough job, if we can, in investigating a situation that has already, without the aid of our complete investigation, brought forth one indictment on a situation that the Commission has had before it on an open docket for nearly three years. The statute authorizes us to conduct that investigation. It is totally independent of and bears no relation to any other proceeding or any other remedy of this government.

Under the circumstances, your Honor, I strongly urge upon you an early decision in this matter in behalf of the Commission, otherwise the whole purport of the Securities Act, so far as these people are concerned, may be, to use the language of the Supreme Court, "frittered away." Thank you, your Honor.

Mr. Clark: If your Honor please, I shall detain you only for a moment. I confess lack of familiarity with the cases which counsel has cited, but as to the general law of contempt I think I should be regarded as able to speak with that positiveness which arises from the fact, which your Honor

takes judicial notice of, that I come in on contempt in more ways and more times than any other member of the Bar.

The Court: Well, I think several people are running you a close second lately. [45]

Mr. Clark: Now, my function here is to direct your Honor's attention to the factual situation with which I am possibly more familiar than Mr. Lavine, as long as Mr. Lavine was out of the city at the time the letter attached to the affidavit was written, and, consequently, that affidavit and the attached matter came to my attention rather than to Mr. Lavine's, and he has not had time to examine it carefully.

Now, I am going to lay down as a premise for the purposes of this motion a fact not alleged in the affidavit, or in the accompanying papers, and, therefor considered as one that does not exist. Having in mind that when I came into court the other day counsel challenged my good faith, I am going to say to your Honor, that while I was challenged as to my good faith, it is impossible for me to believe that the officers who presented this affidavit have exercised that great degree of candor which I would have expected those officers involved to exercise. They have attached a copy of the letter addressed to the Penfield Company of California, 1527 South Robertson Boulevard, but they state in their affidavit that he called at the office of the Penfield Company. But they do not state that they called at 1527 Robertson Boulevard, for the reason that they could not state so truthfully.

Thus, so far as the original letter is concerned, the presumption is that it was mailed to an address where it never reached the Penfield [46] Company at all. They state that they addressed a letter to Mr. Young at a certain place, but they do not state that that place is his residence. And I have no knowledge that it is. But if it was his residence, I assume they would have stated so. They state they addressed another letter to Mr. Lavine's office, but they failed to state the information which they received from that office, and which, if it was stated, would throw a flood of light upon their further statements that they called at the office of the company and were refused the papers. They are very careful to state they did not demand the papers, or not to state they demanded the papers of Mr. Young, while Mr. Young was there, or that Mr. Young refused them access to the papers. Everything that they have alleged in their affidavit is perfectly consistent with the fact that their letter to Mr. Young never reached him, and that Mr. Young had no knowledge that they were going to demand an inspection of the papers at the time they attached or they made their demand.

Now, I submit in all frankness and all candor if that evidence were before the court, and no further than that, on this preliminary showing, that this is sufficient to sustain the jurisdiction of the court to make a finding that this matter of contempt would not before the court; and if an order to show cause is going to issue, I respectfully suggest that it should not issue until such [47]

facts as to make a prima facie showing that contempt has been committed by Mr. Young are presented. In other words, until they have shown by a prima facie case, that Mr. Young had knowledge of their intention to visit the office for the purpose of the inspection at the time that they say they made this, or that Mr. Young was here, or that a refusal was made with Mr. Young's knowledge and under his direction.

Mr. Lavine: May I add another remark to that, your Honor? I have listened to the very able argument of Mr. Townsend on the question generally applicable to various contempt proceedings and his attempt to distinguish those cases from this case as a civil procedure, rather than a criminal one; in its nature. I think your Honor has the right and duty to consider all of the proceedings had.

Now, we have here a very unusual set of facts. Now, before the Circuit Court of Appeals a Mr. A. Judy said:

"I am the Regional Administrator of the San Francisco Regional Office of the Securities & Exchange Commission; I am one of the attorneys of record appearing on behalf of the Securities & Exchange Commission in this matter and am fully acquainted with the facts therein set forth."

And then he refers to various matters that had preceded, and he says that the subpoena he is seeking to enforce [48] was issued in the course of an investigation by the appellee to determine whether the appellant in the course of the sale of securities had violated the registration provisions, Section

5 (a) of the Anti-Fraud Provisions, of Section 17(a) of the Code, 15 U. S. Code, Section 77 (a) and 79 Q(a), and that such investigation may result in the institution of an injunctive action under Section 20 (b) of the Code of Criminal Prosecutions for wilfully violating Section 24, 15 U. S. Code, Section 77 (m).

Now, I think the court may note that thereafter the same ones were subpoenaed prior to the Grand Jury investigation, by the Grand Jury, that the original documents were sought, and that thereafter the Grand Jury returned an indictment.

Now, the function of the Securities & Exchange Commission, as set forth in the statute and the decisions regarding the Securities & Exchange Commissions, is that it performs a similar and distinct function to that of the Grand Jury, and when that object has been completed, its function has been exhausted.

It appears that the Securities & Exchange Commission prepared, apparently, all of the papers, and unless Mr. Townsend is unfamiliar with it, I think it is very evident that the subpoena is identical, and that the matters presented in the indictment are matters which were gathered by the Securities & Exchange Commission and presented to [49] the Grand Jury when that body was in session for the return of the indictment.

Now, the matter cannot be said to be civil where their object was to secure an indictment, and they have secured it and their function has been completed.

Your Honor can certainly take judicial notice of the fact that is the same subpoena, the same nature, the same request, the same thing, and in both instances how can they say they were seeking something different, or that they are seeking a different object than what the Grand Jury sought when it was presented to them? It is asking your Honor to close your eyes to the actual facts as they exist. We are submitting the matter.

The Court: As to the point which Mr. Clark made, whether or not there was a prima facie showing, are you prepared to discuss that?

Mr. Townsend: Well, your Honor, I think so.

The Court: The order was made directing A. W. Young, Secretary-Treasurer—you have the order before you?

Mr. Townsend: Yes, your Honor.

The Court: ——A. W. Young, to appear before the Securities & Exchange Commission, Room 1737, in the United States Post Office, to produce the following documents:

"It is further ordered in accordance with the stipulation and agreement of the parties made in open court that [50] the books, papers, and documents herein ordered to be produced, as aforesaid, in lieu of their physical production, as heretofore ordered, shall be made available to such officers and employees of the Securities & Exchange Commission as may be designated at the office of Respondent at 8900 Beverly Boulevard, Los Angeles, California."

Now, I don't think that the points which Mr.

Clark makes are minor ones. I mean, because of my experience with contempt matters, it is my opinion your matter in your prima facie showing must be accurate; if that were always the case, there would not be so many reversals in contempt cases by the Appellate Courts. The affidavit, I think, is in order with the order.

Mr. Townsend: Yes, your Honor.

The Court: Showing the change of dates, and the designation of the change of place, for instance. I don't think those are material. But in view of the stipulation of their failure to produce them in the Federal Building, at this office——

Mr. Townsend: Yes, your Honor.

The Court: ——but that they would be produced at this address, and there being no showing that this address is the address, or that there has been any change of address of the Penfield Company, and there being no showing that a demand was made on January 24, 1945, and that at that time and place—the place is not indicated—they [51] had ability to comply.

Mr. Townsend: They had the ability to comply.

The Court: There is no indication here that they had the ability to comply, and I think you laid down the rule that the only thing that the court could take into consideration was whether or not they had the ability to comply.

Mr. Townsend: That is their answer to the rule.

The Court: I think you must show that the demand was made at the time and place mentioned in the order.

Mr. Townsend: I certainly think the affidavit shows that, your Honor. We have alleged that.

The Court: That is possibly so.

Mr. Townsend: I am perfectly willing to take evidence on the question right now, your Honor.

The Court: I have not examined it with that point in mind. It did not occur to me until Mr. Clark suggested it.

Mr. Townsend: Your Honor, there is a short answer to that. They are here and appearing in opposition to the motion which certainly evidences that counsel received a copy. There is no need for government counsel, we submit, to show more than that counsel of record in this case had the notice of the rule that your Honor issued.

The Court: I think that is correct if it is here.

Mr. Townsend: Yes. [52]

The Court: I believe that you are correct. I think the points that Mr. Clark made would go to the question of the sufficiency of a showing upon a rule to show cause.

Mr. Townsend: Yes, your Honor.

The Court: But for this purpose I think this affidavit is sufficient.

Mr. Townsend: Yes.

The Court: The rule to show cause will issue. And if you will prepare a form and submit it to counsel under our rules for approval or objection as to form, you may do that. You will provide in it that the order must be served, however, by the marshal, because whether you are correct or whether you are not correct as to the law, and I am in-

clined to think you are incorrect, the rules provide, nevertheless, that the court may, in its discretion, order service to be made by the marshal or provide that the service of the order shall be made by the marshal. I will fix the return date. What day is this set for trial?

Mr. Lavine: We have stipulated it will go until April 10th, your Honor.

The Court: To begin?

Mr. Lavine: Yes, to begin.

The Court: Well, I will make the return date. I wish to make this observation, that whether you are correct, Mr. Townsend, or not, in connection with this procedure being entirely independent of the Grand Jury proceeding, the court [53] is bound to observe in taking judicial notice of this matter, that each one of the subpoenas seek the identical thing, and in view of the fact you have returned an indictment against the defendants, the urgency of the statute of limitations against them has now passed in the criminal matters; however, the Securities & Exchange Commission may have administrative matters upon which there is no statute of limitation, or civil matters upon which there is no statute of limitation, so it seems to me perhaps this matter might well be heard on the contempt after the conclusion of the criminal trial.

Mr. Townsend: Your Honor, it may very well develop that other defendants could be located in connection with the very criminal case that is now pending before your Honor, and a new indictment obtained which might supersede the old one.

The Court: I take cognizance of the provision in Rule 1 of the Rules of Civil Procedure, that the very first thing mentioned is that the rule shall be construed so that there shall be justice.

Mr. Townsend: And speedy.

The Court: And speedy, but justice first.

Mr. Townsend: Yes, your Honor.

The Court: And it seems to me that in view of the fact that you now have the indictment of these people, certainly the government does not want to accumulate [54] penalties on top of these defendants. I mean a whole series of them. I feel that justice would be served if the hearing on this matter were postponed until after the trial of the criminal matter. I would have to hear both of them and I believe it would be fair to them and better for the public interest if this matter were heard after that date. I will, however, make the return date on your rule before that date. But I feel as though I should, in having this intention to make it before that date, make this announcement which I have just stated concerning my views.

Mr. Townsend: In other words, your Honor, you will have to determine that, however, regardless of the showing made on the rule today. [55]

The Court: Yes.

Mr. Townsend: Your determination or decision on the matter will be postponed?

The Court: That is presently my opinion. I will make the return day before then so as to give both government and the defendant an opportunity to say whatever they desire.

Mr. Townsend: Yes, I see, your Honor. Thank you.

The Court: And it may be, at that time, facts might occur which, in my judgment, would require, in the interest of justice, an earlier hearing on the contempt matter.

Mr. Townsend: Under those circumstances, may I request your Honor to fix the time within which we might file with your Honor, prior to the return day, anything in the nature of affidavits or observations that may seem appropriate?

The Court: I think that whatever affidavits you expect to rely upon should be made and served with the return.

Mr. Townsend: Today?

The Court: Oh, no. Today I am simply making an oral order.

Mr. Townsend: I see.

The Court: That the rule shall issue.

Mr. Townsend: Yes.

The Court: You may prepare a form and support it with whatever affidavits you desire, and provide in the order that it and the affidavits shall be served by the marshal. The return day I will now fix. [56]

Mr. Townsend: Yes, your Honor.

The Court: With the idea that my present opinion is, that you return at that time, and I will not that day try the rule, but give consideration to whether or not it should be tried before or after the criminal case. Is that clear?

Mr. Townsend: Yes.

Mr. Bell: In view of the fact that you have mentioned the criminal matter, I would like to say just one thing, namely, that, as I indicated during my own discussion, the investigation of the Grand Jury up to that time indicated there was quite a number of other defendants as to whom proof or evidence was inconclusive, showing that in their minds they needed additional evidence. Now, that evidence, one way or the other, whether it would or would not incriminate them, may be found in the books of the Penfield Company of California.

The Court: It may, no doubt, develop in the trial, because I cannot overlook the fact you are going to have a trial and a great many things may develop which will clarify the whole situation, no doubt.

Mr. Bell: There is one point I wanted to make. The statute of limitations is more or less clipping at the heels of this very case, and those other persons are not yet indicted. Consequently, it may be too late after the return date on this other matter.

The Court: Well, we will expedite the trial, if you [57] have to have witness on the trial, and we will set it down beforehand so that the matter can be disposed of. What would be a convenient date for the return date of this rule? This is February 8th. March 5th? Is that ample time?

Mr. Townsend: Yes, your Honor. The 5th will be fine.

The Court: We will fix the date as March 5th for the return of the rule, at 10:00 o'clock.

Mr. Lavine: That is very satisfactory to me at this time, but I have this one observation to make.

The Circuit Court of Appeals will be here on March 5th and they have set five cases that I have pending up there, and if I could have another time, it might be better.

Mr. Townsend: Earlier, your Honor, would be agreeable to us.

The Court: Well, February 26th. That is a week before that.

Mr. Townsend: Yes, your Honor.

The Court: It is a matter of giving the government time to prepare their affidavits.

Mr. Townsend: The 26th? That is fine.

The Court: I think I would prefer to set it for the 26th and at that time we will determine whether or not we will proceed to hear the rule or postpone it until after the trial of the criminal case.

Mr. Townsend: Yes, your Honor.

The Court: If you wish to file points and authorities [58] I suggest you file them with your return on the rule.

Mr. Townsend: With the return on the rule?

The Court: Yes, if you desire. I would like them sufficiently in advance.

Mr. Townsend: I will get them to you just as quickly as I can have them typed.

The Court: If Mr. Lavine desires to file contradictory authorities, he may.

Mr. Lavine: I will have some time in February to file them, but in March I will not.

The Court: All right.

[Endorsed]: Filed Oct. 4, 1945. [59]

Los Angeles, California

Monday, July 2, 1945, 10:00 a. m.

(Other Court matters.)

The Court: Call the Civil calendar.

The Clerk: No. 2863, Civil, Securities and Exchange Commission v. Penfield Company of California.

Mr. Lavine: Ready, your Honor.

In that matter, we have two affidavits which I have served on counsel and which we wish to file.

The affidavits, in substance, show that Mr. Young was not in the city at the time the notice was sent, nor at the date required or asked for him to appear, which was January 24, 1945. He was out of the city and out of the state. Further, that his counsel was also out of the city and out of the state at that time. His counsel was then in Washington in the East.

Mr. Cuthbertson: This matter has been pending before this Court for over two years. I wonder if the Court would be helped if I made an outline of the chronology of the dates?

Mr. Lavine: I think we tried this case a short time ago.

Mr. Cuthbertson: This is something entirely different from a criminal case.

Mr. Lavine: The Court tried the civil matter too.

The Court: Does this arise out of the civil pro-

ceeding which was in this Court and went to the Circuit Court: [2*]

Mr. Lavine: Yes, your Honor.

The Court: This is the same order involving originally there?

Mr. Lavine: That is correct, your Honor.

The Court: This then is a trial on the merits of the contempt?

Mr. Cuthbertson: This is the order to show cause for the contempt, yes.

The Court: You are ready to proceed?

Mr. Cuthbertson: We are.

The Court: Are you ready?

Mr. Lavine: Yes, we are ready.

The Court: I will mark it ready.

The Court: We will proceed with the Penfield matter right now. Are you ready?

Mr. Lavine: Yes, your Honor.

Mr. Cuthbertson: I think in a contempt proceeding of this nature the burden of proof is upon the plaintiff or moving party as far as the facts are concerned. I think that burden of proof was met with the affidavit which was filed in this Court on January 24th of this year.

This matter has been pending for over two years. On May 14, 1942 the Securities and Exchange Commission issued an order directing an investigation to be made. [3]

The Court: Just a moment. I want to find your affidavit and order to show cause for a contempt proceeding.

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* Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Cuthbertson: That was filed on January 24th of this year. It sets forth the facts which I was about to outline to the Court. I thought I would save the Court the trouble of reading it.

The Court: Go ahead.

Mr. Cuthbertson: On May 14, 1942 the Commission issued this order directing its Los Angeles office and other offices to commence an investigation of certain matters, certain activities of the Penfield Company which the Commission was convinced constituted violations of the Securities Act of 1933.

An order was made appointing Charles R. Burr, among others, as officers with certain powers. The powers which were given by statutes and by law to these officers is set forth rather broadly and I would like to read it to the Court, Section 19 (b) of the Securities Act of 1933.

The Court: I think their powers are all right. I held that it was originaly, and that was later affirmed by the Circuit Court.

Mr. Cuthbertson: Acting under that order and with those powers, the Commission issued a subpoena dated April 19, 1943 directing the Penfield Company to produce certain books and records of that corporation. That subpoena was disobeyed. Under Section 22(c) of the Act which provides [4] that where such a subpoena is not obeyed the remedy of the Commission will be to come before a District Court, and the Court then upon a proper showing is required to order that the subpoena be obeyed. That was done in this case. A hearing was held here several days, I understand—that was

before I was associated with the Commission—and on June 1, 1943 this Court ordered that the books and records specified in the subpoena should be produced before the Securities and Exchange Commission on June 8 of 1943.

An appeal was then taken by the respondent and, after lengthy appeal time, on December 7, 1944, it reached the Supreme Court of the United States and it denied the petition for a certiorari.

Then acting under the powers which the officers appointed by the order had, on January 16th there was served upon the respondent Young by mail, and I am informed also by mail a notice was sent to his counsel, directing him to produce those books and records on January 24th.

Now I am not at all sure that that sort of a step was necessary inasmuch as this Court had made an order directing that the subpoena be obeyed and the books and records be produced—that was stayed during the force and effect of the appeal—but on December 7, 1944, when the mandate came down from the Circuit Court and was spread on the records of this Court, I think there was a positive duty then on the part of the respondent to, within a reasonable time, comply with the [5] order of the Court. That was not done, and on January 24th we came before this Court with an affidavit and an order to show cause and asked that the order issue. The return date set forth by the Court was February 5, 1945, and the matter had been continued then to these various dates: February 8,

1945, then February 26, from February 26 to May 28, to July 25 and to today.

I think it clearly shows disrespect and contempt for the Court's order made over two years ago when we are met this late date with the type of affidavit of the type and nature the respondent has filed.

The Court: Let me get straight on some of these dates.

The mandate was spread on December 7, 1944. Then after that the Commission amended the order of designation of the examining officer that was involved in the amendment.

Mr. Cuthbertson: I am not certain of that.

The Court: It says here that it was further amended by the designation of Charles R. Burr.

Mr. Cuthbertson: My impression was he had been appointed some time prior to that.

The Court: Well, it appears here it was on January 6th. I suppose for that reason that the letter was addressed to Mr. Young because there was a different person for him to appear before than that contained in the mandate.

What did you say happened in February?

Mr. Cuthbertson: Nothing happened. [6]

The Court: You said this order directed him to appear on January 24th.

Mr. Cuthbertson: That is right. The return date of the order to show cause which was obtained on January 24th was February 5, 1945.

The Court: That was just the order to show cause on this contempt?

Mr. Cuthbertson: Yes, your Honor.

The Court: All right, may I hear from you?

Mr. Lavine: We have submitted the affidavits to counsel and, as your Honor has pointed out, the only thing we have done here is send a letter with a new officer stating that Mr. Burr was going to call at the offices of the Penfield Company on January 24, 1945. Now Mr. Burr was not the person who was designated and, according to the affidavits of Mr. Young and his wife, he was out of the city at the time, and his counsel was out of the city also at the time. He was not back in the city until February. So it was merely a request by Mr. Burr. There was no subpoena or any other notice served on Mr. Young other than a letter in the form of this letter by Mr. Burr, who was not the officer designated in the former order. He said he would call, and that is all they did. I think that is insufficient upon which to predicate a contempt proceeding which is a quasi-criminal proceeding in this matter.

The Court: The order that was made on June 1, 1943 and [7] from which the appeal was taken ordered and directed Young to produce certain books and records or, in accordance with the stipulation and agreement of the parties made in open court, that the books, papers and documents herein ordered to be produced as aforesaid in lieu of their physical production as heretofore ordered shall be made available to such officer and employees of the Securities and Exchange Commission as may be

designated at the office of the respondent at 8900 Beverly Boulevard, Los Angeles, California.

Now it does not appear to me that there was any particular person designated in the order, it was an officer of the Securities and Exchange Commission. Now they merely advised Young that they would call on January 24th. They did call on January 24th, according to the affidavit, which is not denied, at 8900 Beverly Boulevard.

Mr. Lavine: We can't tell, your Honor. The letter is addressed to another address.

The Court: What letter?

Mr. Lavine: The letter of Mr. Burr to Mr. Young, is addressed to 2427 South Robertson Boulevard.

The Court: Yes, it is, and it says that they presented themselves at the office of the Penfield Company of Los Angeles. I don't know whether that was 8900 Beverly Boulevard or not.

Mr. Cuthbertson: I am informed by Mr. Burr, whose affidavit that is, that they called at the Beverly Hills office [8] and also at the Robertson address.

The Court: It isn't in the affidavit. Do you wish to put him on the witness stand?

Mr. Lavine: I don't.

The Court: The affidavit of the defendant Young indicates that he was absent from the city from January 11 to February 3, so the question now is whether or not his mere absence from the city is sufficient to exculpate him from the order of the Court.

I think that the order is pretty definite, that he should have made the books and records available to Mr. Burr, and even though he were absent from the city I think he should have made some provision so that the examination could have been had, because the order to produce the books and records was made in the alternative, to examine them at their office as an accommodation to the defendant in order to prevent him from having to physically bring the books and papers to the office and interrupt his business. I think the order is definite enough that it should have been obeyed.

The question now is whether or not, as I have indicated, his absence from the city is sufficient to excuse him. I don't believe that it is, Mr. Lavine. I think that he should have provided some means or some person so that they could have been available.

Mr. Lavine: Your Honor, might I call your attention to the fact that the mandate, while the mandate came down in [9] December, that some time in January or—I am not sure as to the time, but subsequent to the December time—there was a request made for these books and instead of making the request to Mr. Young they sought out Mr. Black, who was the president of the Penfield Company, and they served papers on him. He made a return with respect to those, and the hearing was had before McCormick in respect to that.

The Court: That was in connection with a Grand Jury subpoena?

Mr. Lavine: No, I think it was in connection

with both subpoenas. I think there were two subpoenas served on him.

The Court: That may be possible because the Grand Jury subpoena was transferred to me for hearing.

I think, Mr. Lavine, that the order was definite enough and he knew what was wanted and I think that he ought to be found guilty here of contempt in this matter.

Mr. Young is present?

Mr. Lavine: Yes, your Honor.

The Court: That will be the order of the Court, that he is guilty of contempt.

Are you ready for sentence?

Mr. Lavine: Yes, your Honor.

The Court: Come forward, Mr. Young.

Mr. Young: Might I say a word, your Honor?

The Court: I think you had better talk to your counsel.

Mr. Lavine: Your Honor, the defendant wishes to point [10] out to your Honor that in connection with the matter he was not aware of the time at the time that the mandate came down as to what further proceedings might be had in connection with the matter and he was trying to make a living and went out of the city.

The Court: He had good counsel and if he had consulted him when the mandate came down I think he would have been advised of what he was obliged to do.

Mr. Lavine: Unfortunately I went out of the city too, your Honor, so we were both out of the

city. I want your Honor to take that into consideration.

The Court: Very well. The order will stand that the defendant be adjudged guilty of contempt.

Do you have anything to say in connection with the disposition of this matter, Mr. Cuthbertson?

Mr. Cuthbertson: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refused to produce his books and records for our inspection.

The Court: I don't think that I am going to be disposed to do anything like that. I sat here for six weeks and listened to books and records. The Government produced people from all over the United States in connection with the [11] Penfield matter.

Mr. Cuthbertson: I might say, your Honor, that we have in mind that these books and records may disclose certain acts other than those charged in the indictment. We don't propose to go over the same matter that the Court went over in connection with the criminal case.

The Court: The Court can take judicial notice of its own books and records, and in that trial the evidence was clear and definite and positive from all of the Government's witnesses, that during one period of time this defendant had nothing whatsoever to do with the Penfield Company. Whether

that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know.

The judgment and sentence of the Court is that the defendant pay a fine of $50, and stand committed until paid.

Mr. Lavine: Could we have a couple of hours, your Honor?

The Court: A stay of execution until tomorrow morning at 10:00 o'clock.

[Endorsed]: Filed Oct. 4, 1945. [12]

[Endorsed]: No. 11173. United States Circuit Court of Appeals for the Ninth Circuit, Securities and Exchange Commission, Appellant, vs. The Penfield Company of California and A. W. Young, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 2, 1945.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

No. 11173

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

v.

THE PENFIELD COMPANY OF CALIFORNIA

Respondent.

STATEMENT OF POINTS ON WHICH THE APPELLANT INTENDS TO RELY

The appellant intends to rely in its appeal upon the point, as listed in the Statement of Points filed with the District Court, that having adjudged Young, the Secretary-Treasurer of the respondent company in contempt, the District Court erred in ordering Young to pay a fine of $50.00 instead of imposing a remedial penalty calculated to coerce Young to produce or allow inspection of the books and records of the respondent pursuant to the District Court order of June 1, 1943, and;

The parts of the record necessary for a consideration of said point are the items specified in the

Designation of Contents of Record on Appeal dated October 2, 1945 and filed with the District Court.

Dated: November 1, 1945.

ROGER S. FOSTER,
Solicitor.

HOWARD R. JUDY,
Regional Administrator

G. M. CUTHBERTSON,
Attorneys for Securities and Exchange Commission.

Received a Copy of the Within Document This 1st Day of November, 1945.

.....
Attorney for Respondent.

[Endorsed]: Filed November 2, 1945. Paul P. O'Brien, Clerk.

No. 11173

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

SECURITIES AND EXCHANGE COMMISSION,

Appellant,

vs.

THE PENFIELD COMPANY OF CALIFORNIA and A. W. YOUNG,

Appellees.

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

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PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit.

Excerpt from Proceedings of Friday, May 17, 1946.

Before: Denman, Mathews and Orr,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein submitted on behalf of appellee on brief on file, and argued by Mr. Robert S. Rubin, Assistant Solicitor, Securities and Exchange Commission, counsel for appellant, and submitted to the court for consideration and decision, with leave to counsel for appellant to file certified copy of additional papers filed in District Court.

In the District Court of the United States
for the Southern District of California
Central Division

Civil Action No. 2863 P.H.-Civ.

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

vs.

THE PENFIELD COMPANY OF CALIFORNIA,

Respondent.

ORDER

Upon reading and considering the verified "Affidavit for order to Adjudge A. W. Young, Secre-

tary-Treasurer of the Penfield Company of California, in Contempt," this day filed in the above entitled action, and good cause being shown thereby;

It is Ordered that A. W. Young, Secretary-Treasurer of the Penfield Company, appear before the undersigned Judge of the above entitled Court, in the United States Courthouse in the City of Los Angeles, California, on the 5th day of February, 1945, at 2:00 o'clock p.m. of that day, or as soon thereafter as the matter may be heard, and show cause, if any there be, why a further order should not be made herein, ordering and directing said A. W. Young, Secretary-Treasurer of the Penfield Company, to show cause why an order should not be made holding said A. W. Young in contempt of this Court and to be dealt with accordingly.

Dated: January 23, 1945.

[Seal] PERSON M. HALL,
United States District Judge.

A true copy, attest, etc. Edmund L. Smith, Clerk U. S. District Court, Southern District of California. By Theodore Hocke, Deputy.

[Endorsed]: Filed Jan. 24, 1945.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, June 25, 1946.

Before: Denman, Mathews and Orr,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE

Ordered that the typewritten opinion and dissent this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with the majority opinion rendered.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: Denman, Mathews and Orr,
Circuit Judges.

Denman, Circuit Judge:

[Title of Cause.]

OPINION AND DISSENT

This is an appeal by the Securities and Exchange Commission, hereinafter called the Commission,

from an order of the district court made on the motion of the Commission which, though it held appellee Young, an officer of the Penfield Company, in contempt for failing to comply with an order to produce documents for the inspection of the Commission's examiner and fined Young $50.00, failed to enforce the disobeyed order by committing Young unless he complied. Young paid the fine. The motion and order were made in the same proceeding in which the disobeyed order was made. Penfield Co. v. S. E. C., 143 F. 2d 746 (CCA-9). It is an appealable order. Clarke v. Federal Trade Commission, 128 F. 2d 542, 543 (CCA-9).

Young did not appeal from the order holding him in contempt. That decision is final and the only question before us is the extent of the remedy to which the Commission is entitled.

Appellees contend that there is no obligation on the district court to commit Young until he has complied with the court's order because it is discretionary with that court either to fine or to imprison and that, since Young has paid the fine, the case is moot. We do not agree. We consider it at least an abuse of discretion not to grant the full relief to the Commission which the statute intended, namely, the access to the books and records in question, and instead to impose the fine.

The proceeding for the required access is civil in character and refusal to commit until the order is obeyed, frustrates the remedial purpose of the legislation creating the right to secure access to the

documents.[1] As was said in Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 and 442,

"* * * the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory."

"* * * Imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in fact or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order * * * If imprisoned, as aptly said in In re Nevitt, 117 Fed. Rep. 451, 'he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do."

Parker v. United States, 153 F. 2d 66, 70 (CCA-1); In re Kahn, 204 Fed. 581, 582 (CCA-2).★

* On August 27, 1946, the Circuit Court of Appeals ordered the opinion amended by adding the following:

"In the cases cited by appellees the petitioners were not, as here, seeking a civil remedy. In ex parte Lang, 18 Wall. 163, petitioner was convicte of a crime. In In Re Bradley, 318 U.S. 50, he was sentenced for a criminal contempt. In neither had there been denied to the opposing litigant a civil remedy to which he was entitled."

there had been a trial of appellees for certain violations of the Securities and Exchange Act in which these documents and records would have been relevant evidence. There is no merit in this contention since the records well may have disclosed other offenses against the Securities and Exchange Act.

The order imposing the fine is reversed and the case remanded to the district court for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question. "If he complies, or shows that compliance is impossible, he must be released, for his confinement is not as punishment for an offense of a public nature." Parker *v.* United States, 153 F. 2d 66, 70 (CCA-1).

The order of the district court is
Reversed.

Mathews, Circuit Judge, dissents.

[Endorsed]: Opinion and Dissent. Filed Jun. 25, 1946, as amended by order of July 16, 1946. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, July 16, 1946.

Before: Denman, Mathews and Orr,
Circuit Judges.

[Title of Cause.]

ORDER AMENDING OPINION, AND DENYING PETITION FOR REHEARING

By direction of Denman and Orr, Circuit Judges, It is Ordered that the opinion of this Court filed on June 21, 1946, is amended by adding to the last sentence in the paragraph ending first on page 2 of the printed opinion the words "and instead to impose the fine."; and by inserting after the word "order" in the first line of the paragraph beginning first on page 3 of the printed Opinion the following: "imposing the fine."

It is Further Ordered that the petition of appellee, filed July 13, 1946, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11173

SECURITIES & EXCHANGE COMMISSION,
Appellant,

vs.

THE PENFIELD COMPANY OF CALIFORNIA and A. W. YOUNG,
Appellees.

DECREE

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

[Endorsed]: Decree. Filed and entered, June 25, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing One hundred (100) pages, numbered from and including 1 to and including 100, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 29th day of July, 1946.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 453

ORDER ALLOWING CERTIORARI—Filed November 18, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - S. Supreme Court, U. S.
SEP 3 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1946

No..... 453

THE PENFIELD COMPANY OF CALIFORNIA AND A. W. YOUNG,

Petitioners.

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

Petition for Writ of Certiorari and Brief in Support Thereof.

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Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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IN THE

Supreme Court of the United States

October Term, 1946

No.....

THE PENFIELD COMPANY OF CALIFORNIA AND A. W. YOUNG,

Petitioners.

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

PETITION FOR WRIT OF CERTIORARI

Your petitioner, A. W. Young, and the Penfield Company of California, petition for a writ of certiorari from a judgment and order of the Ninth Circuit Court of Appeals, reversing a judgment of the District Court of the United States against the petitioner, A. W. Young, in which the petitioner was fined $50.00 for contempt of court.

Opinion of Court.

The opinions and amendments of the Circuit Court of Appeals for the Ninth Circuit is unreported but is contained at page 95-99 of the record. Except an additional supplement to opinion filed Aug. 27, and is in appendix to this brief.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 347, United States Codes, and by the Securities and Exchange Act of 1933, Title 15, Section 77v(a). The judgment of the District Court was rendered on July 2, 1945. The Securities and Exchange Commission appealed the judgment and order of the District Court on Sept. 26, 1945, and the Circuit Court of Appeals reversed the order of the District Court on June 25, 1946. [R. 95.] A petition for rehearing was duly and regularly filed in the Ninth Circuit Court on July 12, 1946, by the Appellee, and denied by the Ninth Circuit Court on July 16, 1946. One of the three justices dissented from the majority opinion.

The Facts.

During an investigation by the Securities and Exchange Commission, an officer of the Los Angeles office of the Commission subpoenaed certain books and records of the Penfield Company of California, consisting of twenty items named in the subpoena. [R. 12.] The subpoena was resisted for want of jurisdiction in an independent proceeding and heard and tried by the District Court, which found in favor of the Securities and Exchange Commission, and issued an order for the production of the books and records as subpoenaed. The order was appealed from and was affirmed by the Ninth Circuit Court of Appeals. 143 F. (2d) 746, Certiorari denied 323 U. S. 768.

Certiorari was denied by the United States Supreme Court.

In the meantime, however, the grand jury had returned an indictment against the defendant and others, and during the trial of the case, the Government produced, through one of the defendants against whom the case was dismissed and who had been a President of the Penfield Company of California, and who thereafter became a witness for the Government in the trial, most of the documents and records sought for in the subpoena *duces tecum* previously requested by the Securities and Exchange Commission.

The criminal trial ended in acquittals of the defendants and thereafter the defendant Young was brought back into court to show cause why he should not be punished for contempt of court for disobedience of the subpoena of the Securities and Exchange Commission.

It appeared that some time prior to January 24, 1945, [the letter is dated January 16, 1945, R. 9], Mr. Burr, an officer of the Securities and Exchange Commission at Los Angeles, sent a letter to the Penfield Company at the address 2427 South Robertson Boulevard, (this was not the address of the Penfield Company) [R. 83], saying that Mr. Burr would present himself at the offices of the Penfield Company on January 24, 1945. The offices of the Penfield Company were at 8900 Beverly Boulevard, Los Angeles. Young and his wife were out of the city at the time and were not back in the city until February. There was no subpoena or any other notice served on Mr. Young personally, other than the sending of the letter, which did not reach the appellant Young, at any time prior to January 24, 1945, and so far as the record shows, at any time. The affidavit of the appellant Young indicates he was absent from the city

from January 11, 1945, to February 3, 1945. The trial court considered whether mere absence from the city after the sending of the letter was sufficient to exculpate him from the order, and held it was not. It was also shown that his counsel also was absent from the city during this period of time. [R. 82.]

The letter of Mr. Burr that he would call at the office of the Penfield Company on January 24, 1945 [R. 9], does not state that Mr. Burr made any demand at the offices for the papers or that he would do anything other than appear at the offices for the purpose of examining the books and records referred to in the order of Judge Hall.

The affidavit on which the first proceedings in contempt were predicated was dated January 23, 1945 [R. 93, 94], or one day prior to the date when the appearance of Burr was made. The subsequent affidavit of Charles R. Burr [R. 6, 7], does not state that when he appeared at the office of the Penfield Company in Los Angeles (without mentioning any address) that he saw Mr. Young or that Mr. Young was there, or that Mr. Young refused him access to the papers. Everything stated in the affidavit is consistent with the fact that the letter on which the proceedings were based never reached Mr. Young, but Mr. Young had no knowledge that an inspection was to be demanded nor that they made the demand of him nor that he refused such demand.

It was shown that at the time the letter was sent and continuing throughout the period mentioned that neither the defendant nor his counsel were present in the city of Los Angeles nor did they receive the letter nor did they know of its contents. [R. 82.] This was the

only attempt made by the Securities and Exchange Commission to secure the records and they proceeded to hale the petitioner into court for disobedience of the order made pursuant to their failure to see the books, upon the basis of the letter which had not been received by petitioner or his counsel prior to that date. In fact, petitioner's counsel was in Washington, D. C., presenting a case on behalf of the Mexican Government and was having considerable trouble on account of transportation in getting back to Los Angeles, and the petitioner was also out of the city during this entire time on business.

When the matter was before the court, all that the attorney for the Securities and Exchange Commission said was:

> "So far as the punishment which the court might see fit to impose, that is up to the court. We are still anxious to get a look at these books and records so I suggest to the court, if he be so disposed, whatever punishment the court might see fit to impose would be in connection with or so long as he refuses to produce his books and records for our inspection." [R. 86.]

The court, nevertheless, found the petitioner guilty of contempt and fined him $50.00. The petitioner paid the fine and did not appeal. [R. 87.]

The Securities and Exchange Commission, after waiting from July 2, 1945, filed notice of appeal on September 26, 1945. [R. 23.] The Circuit Court of Appeal, one judge dissenting, reversed the judgment of the District Court and made a new order requiring imprisonment of Young to compel his obedience to the order to produce documents. Nothing was done about the fine already paid into the United States Treasury. [R. 98.]

Questions Presented by This Appeal.

1. Where a District Court having jurisdiction of the person and the subject matter regarding his previous order to produce certain books and documents on behalf of the Securities and Exchange Commission has made an order finding a defendant guilty of contempt for refusal of his order, and imposing a monetary fine of $50.00, which was paid, is the jurisdiction of the court exhausted, and may the Circuit Court of Appeals substitute and require the District Court to make an additional order in respect to the case on an appeal by the administrative agency?

2. Where a District Court has made an order to a secretary of a corporation to produce certain books and records, which order is affirmed on appeal, is the mere sending of a letter, without personaal service, to the secretary of the corporation and to his counsel, both of whom are out of the city, a sufficient predicate for a finding and determination of contempt, where it is not shown that the secretary or his attorney ever received the letter at the time designated in the letter for the proposed inspection, nor that the secretary of the corporation refused to obey any command as contained in the letter nor refused to abide by any order of the court?

3. Where a request is made for certain books, records and documents by the Securities and Exchange Commission covering a period from the commencement of the corporation to June 1, 1943, is such a demand a moot question more than three years after the period covered by the order, and after the corporation has ceased actively to function.

4. Where matters demanded by the Securities and Exchange Commission in an order for a *subpoena duces tecum*

to the secretary of the corporation are produced by other witnesses in a criminal trial before a district court judge, and that judge has judicial knowledge that nearly all of the matters designated in the previous order for *subpoena duces tecum* have been produced before him in a lengthy criminal trial, may he consider all of those matters which occurred before him in such criminal trial in reaching his decision on the disposition of the contempt proceedings?

5. Can the Securities and Exchange Commission compel the court to impose a different punishment than the court determines as proper in the case?

Reasons for Allowing the Writ.

I.

The case raises a question of extreme importance in the administration of the law of contempt in relation to administrative agencies.

Nearly every statute relating to administrative agencies contains provisions for the court to enforce the orders if they are deemed proper and to make such punishment as it, the court, sees fit to make. The decision of the Circuit Court puts this power in the hands of the administrative agency, contrary to the intent of Congress that that function was to be performed by the District Courts. It made a rubber stamp out of District Judges for the administrative agencies.

II.

The issue is raised as to whether the payment of a fine has exhausted the jurisdiction of the court and, therefore,

whether the decision of the Circuit Court is not in conflict with the recent decision of this court in *In re Bradley*, 318 U. S. 50, 87 L. Ed. 608.

III.

The decision of the Circuit Court is in conflict with decisions of this Honorable Court and in conflict with the law of contempt set forth in the statutes and applicable cases. The decision of the Circuit Court would substitute its judgment for that of a trial court, and tell the trial court what order or judgment it should impose in the case. This is contrary to the provisions of Section 19(b), Securities and Exchange Act of 1933, 15 U. S. C. 77 and 77(v)(b).

Stewart v. United States, 236 Fed. 838;

Ex Parte Grossman, 267 U. S. 87, 69 L. Ed. 527;

Gompers v. Buck Stove and Range Co., 221 U. S. 418, 55 L. Ed. 797;

Ex Parte Lange, 18 Wall. 163, 21 L. Ed. 872;

In re Bradley, 318 U. S. 50, 87 L. Ed. 608.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1946.

No.....

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

vs.

THE PENFIELD COMPANY OF CALIFORNIA AND A. W. YOUNG,

Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

ARGUMENT.

I.

The Writ of Certiorari Should Be Granted to Determine Important and Fundamental Questions of the Law of Contempt With Relation to Administrative Agencies. The Decision of the Circuit Court for the Ninth Circuit Is in Conflict With and Contrary to the Statutes and Laws Applicable Thereto.

The Circuit Court of Appeals' decision is contrary to the provisions of Title 15, Section 77V(b) which provides *punishment* by the District Court in its discretion for a contempt thereof. The order and decision of the Circuit Court would now make a rubber stamp out of the District Court for Administrative Agencies and leave no right or

discretion in the District Court to impose the punishment which it saw fit to impose, and would enable every administrative agency to compel the District Court to impose such punishment and order as the administrative agency wished. The determination of the law on this subject is therefore a matter of extreme importance and should be determined by this Honorable Court.

Re Debs, 158 U. S. 564;

New Orleans v. N. Y. Mail Steamship Co., 20 Wall. 387-403 and cases therein cited.

In *Crosby's Case,* 3 Wils. 188, Mr. Justice Blackstone said:

> "The sole adjudication for contempt, and the punishment thereof, belongs exclusively and without interference to each respective court."

In *Bessette v. W. B. Conkey Co.,* 194 U. S. 324, 48 L. Ed. 997, the court said that disobedience of a subpoena is among those acts primarily directed against the power of the court, and classes it as similar to misconduct in a court-room. The case also says that "the orders imposing punishment are final" (p. 336).

The petitioner, against whom the punishment was imposed, did not appeal. It was the respondent at whose request the punishment was inflicted, but who was dissatisfied with the type of punishment which the court imposed. Such dissatisfaction does not give jurisdiction to appeal.

In *Fischer v. Hayes,* 102 U. S. 121, 26 L. Ed. 95, the court held that the imposition of a fine for contempt is a judgment.

II.

The Circuit Court Erred in Holding That the Jurisdiction of the District Court Was Not Exhausted Upon the Payment of the Fine Imposed by the District Court, and in Substituting Its Judgment for That of the District Court.

Section 77v(b) provides that in case of contumacy or refusal to obey a subpoena issued to any person, "any failure to obey such order of the court may be punished by said court as a contempt thereof."

The Securities and Exchange Commission Act does not provide what the punishment for contempt should be. The extent of the punishment and the power of punishment, therefore, must be measured *in pari materia* with other sections of the code, to wit, Title 28, Section 385.

It will be noted that the power to punish for contempt is either by fine or by imprisonment, and not both. Having imposed the fine, the jurisdiction of the court is exhausted. Section 77v(b) provides that failure of the person to obey the order of the court may be *punished* as a contempt.

The language of the statute, therefore, provides for punishment in the discretion of the District Court.

The court by way of punishment imposed a fine of $50.00. The imposition of a fine for contempt is a punishment in a criminal action.

New Orleans v. New York Mail Steamship Co., 20 Wall. 387, 22 L. Ed. 354;

Fischer v. Hayes, 6 Fed. 63;
Ex parte Kearney, 20 U. S., 7 Wheat. 38, 5 L. Ed. 391;
In re Mullee, Federal case No. 9911;
Hayes v. Fischer, 102 U. S. 121, 26 L. Ed. 95;
N. R. Anargyros, 291 Fed. 208.

Where one is punished as for an offense in having wilfully defined the power or authority of a court of the United States by knowingly disobeying an injunction order, he stands as one who has been found guilty of an offense against the United States.

Butte, etc. Consolidated Mining Co. v. Montana Ore P. Co., 158 Fed. 131.

Punishment imposed to uphold the authority of the court for disobedience is for criminal contempt and the penalty is for the benefit of the United States.

The party chiefly interested in the proceeding is the Government or the public. The proceeding is for a criminal contempt.

New Jersey Patent Co. v. Martin, 166 Fed. 1010;
In re Eugene Debs, 158 U. S. 564, 39 L. Ed. 1092;
Bessette v. W. B. Conkey Co., 194 U. S. 324, 48 L. Ed. 997;
In re Christensen Engineering Co., 194 U. S. 458, 48 L. Ed. 1072;
Garrigan v. U. S., 163 Fed. 16;
Merchants Stock and Grain Co. v. Board of Trade of Chicago, 201 Fed. 20.

III.

The Circuit Court Was Without Power to Order the District Court to Make a Further Order in the Contempt Proceedings.

The District Court only has jurisdiction to find the defendant guilty of contempt where there was a proper predicate to the proceedings showing that there had been a willful disobedience of the court's order. Since the petitioner in this case did not appeal from the original order of the District Court, in view of the fact that he was fined $50.00, and paid the fine, the Circuit Court's order was invalid because it was predicated upon a void order of the District Court.

The record shows that there never has been a disobedience or a refusal by the respondent to any order of the court validly served upon him. The affidavit of Charles R. Burr carefully refrains from stating that he ever served A. W. Young, the Secretary of the Penfield Company of California, with any order demanding the books on a specific date, or that he was refused any such right as contained in any such court order.

IV.

The Circuit Court Erred in Requiring the District Court to Make an Additional Order to Jail A. W. Young Until He Produces the Documents. Such an Order Invades the Jurisdiction of the District Court and Is Beyond the Jurisdiction of the Circuit Court.

The power of a court to make an order carries with it the equal power to punish for a disobedience of that order and the inquiry as to the question of disobedience is a special function of that court and may not be submitted to another tribunal, be it a jury or another court.

In re Eugene Debs, 158 U. S. 564, 39 L. Ed. 1092;

In re Bradley, 318 U. S. 50;

Garrigan v. U. S., 163 Fed. 16.

The Circuit Court of Appeals took on the functions of the District Court in this case and has virtually made the District Court a rubber stamp for administrative agencies.

V.

Section 77v(b) of Title 15 Only Gives the District Court Power to Punish as Said District Court Sees Fit in Its Discretion. The Circuit Court, by a Two to One Decision, Has Stripped the District Court of the United States of That Discretion.

It is important, therefore, that certiorari be granted by this court in order that a fundamental question of administrative law and the power of the District Court in contempt proceedings may be clarified.

VI.

Jurisdiction of the Court Was Exhausted Upon the Payment of the Fine and It Is Necessary That Certiorari Be Granted in Order That the Conflict Between the Circuit Court of Appeals and the Decisions of This Court in Relation to the Applicable Law of Contempt Be Determined by This Honorable Court.

The decision is directly in conflict with the decision in *In re Bradley,* 318 U. S. 50, 87 L. Ed. 608, and other decisions of this court.

For all of the foregoing reasons, it is respectfully submitted that this very Honorable Court should grant certiorari and reverse the judgment and order of the Circuit Court of Appeals in this case.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners.

§77v. Jurisdiction of offenses and suits.

s. (b) In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be *punished* by said court as a contempt thereof.

Title 15, Section 77v(b), United States Code.

APPENDIX.

§77v(a). Jurisdiction of offenses and suits.

(a) The districts courts of the United States, the United States courts of any Territory, and the district court of the United States for the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

Title 15, §77v(a), *United States Code Annotated.*

§385. (Judicial Code, section 268.) Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, *by fine or imprisonment,* at the discretion of the court, contempts of their authority. Such power to pun-

ish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (R. S. §725; Mar. 3, 1911, c. 231, §268, 36 Stat. 1163.)

Title 28, Section 385, United States Code.

United States Circuit Court Appeals for the Ninth Circuit.

Securities and Exchange Commission, Appellant, vs. The Penfield Company of California and A. W. Young, Appellees. No. 11173.

ORDER.

Upon Appellant's Motion to Shorten Time for Issuance of Mandate, Submitted on Notice Without Opposition.

Before: Denman, Matthews and Orr, Circuit Judges.

It is ordered that there be added to the sixth line from the bottom of page 2 of our opinion filed herein on June 25, 1946, the following:

> "In the cases cited by appellees the petitioners were not, as here, seeking a civil remedy. In *ex parte* Lang, 18 Wall. 163, petitioner was convicted of a crime. In *In re Bradley*, 318 U. S. 50, he was sentenced for a criminal contempt. In neither had there been denied to the opposing litigant a civil remedy to which he was entitled."

The motion to shorten time for issuance of Mandate is granted.

WILLIAM DENMAN,
United States Circuit Judge.

WM. E. ORR,
United States Circuit Judge.

[Endorsed]: Filed August 27, 1946. Paul P. O'Brien, Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.
No. 453.

PENFIELD COMPANY OF CALIFORNIA, and A. W. YOUNG,
Petitioners,

vs.

SECURITIES & EXCHANGE COMMISSION,
Respondent.

OPENING BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 453.

PENFIELD COMPANY OF CALIFORNIA, and A. W. YOUNG,
Petitioners,

vs.

SECURITIES & EXCHANGE COMMISSION,
Respondent.

OPENING BRIEF.

Previous Decisions.

The decision of the Circuit Court of Appeals is contained in 157 F. (2d) 65.

Jurisdiction.

Jurisdiction is conferred in this Court under Title 28, Section 347, U. S. C. Questions of jurisdiction of the SEC to appeal to the Circuit Court will be presented in the brief.

Certiorari was granted by the Supreme Court on November 18, 1946.

Statutes Involved.

The applicable provisions of the Securities Act of 1938, 48 Stat. 74, 15 U. S. C. 77a, *et seq.*, provides as follows:

> "Sec. 22b. In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States Courts within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question, *and any failure to obey such order of the Court may be punished by said Court as a contempt thereof.*" (Italics ours.)

Section 385, Title 28, U. S. C., provides as follows:

> "Sec. 385. (Judicial Code, section 268.) Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, *and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority.* Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (R. S. Sec. 725; Mar. 3, 1911, c. 231, Sec. 268, 36 Stat. 1163.)" (Italics ours.)

Questions Presented.

1. Whether an appeal lies by the Securities and Exchange Commission to the Circuit Court of Appeals from an order of the District Court, rendered July 2, 1946, fining petitioner $50 which was paid, where notice of appeal was filed September 24, 1946, but no application according to Title 28, Section 250, U. S. Codes, for allowance of an appeal was ever made?

2. Whether an appeal lies from an order adjudging a person guilty of contempt of court for failure to produce books and records wherein the District Court in the exercise of its discretion imposed a fine for a violation of its order, which fine was paid?

3. Whether the Circuit Court of Appeals after the payment of a fine can substitute its judgment for that of the District Court and order, in addition to the payment of the fine, that the petitioner be imprisoned until compliance with the District Court's order is carried out?

4. Whether on appeal from the District Court's order adjudging the petitioner guilty of contempt the petitioner may attack the fundamental basis for the original order of the District Court as not being founded upon sufficient evidence?

5. Whether the District Court which had before it a criminal trial, in which nearly all of the matters sought by the subpoena were produced through other witnesses, could take judicial notice of all of those matters in disposing of the controversy?

Statement of the Case.

On June 1, 1943, the District Court of the United States granted an application of the Securities & Exchange Commission and ordered A. W. Young, the petitioner as secretary-treasurer of The Penfield Company, to produce specified items requested in the subpoena. The order was appealed and affirmed on June 30, 1943, by the Ninth Circuit Court of Appeals (143 F. (2d) 746).

A petition for a writ of certiorari was denied (323 U. S. 768). Thereafter, on November 13, 1944, the mandate of the Circuit Court of Appeals issued and was spread upon the minutes of the District Court on December 7, 1944 [R. 5].

Thereafter, on January 16, 1945, the designated officer of the Commission *addressed and mailed a letter to A. W. Young and to Morris Lavine, his attorney*, advising that this officer would call at the office of The Penfield Company at its address, 1427 South Robinson Boulevard, for the purpose of examining the books and records [R. 910].

It appears that both Mr. Young and his attorney were out of the city at the time of the mailing of the letter and the call by the officer(s) of the Securities & Exchange Commission. While it appears that other attorneys' names appear in the notice, it is of record that Francis A. Reilley died and that Morris Lavine was substituted in his place and was the only attorney acting in the matter; and it further appears that neither of the notices were received by the petitioner or by his attorney, nor were either of them served personally or attempted to be served personally, but only by mail. Further, it appears that on the same day at least that the officers called at the office

of The Penfield Company, an order was issued ordering the petitioner Young to show cause why he should not be held in contempt of court.

Francis A. Reilly, who had died and in whose place Morris Lavine was substituted, and other attorneys no longer in any way connected with the case, as shown by the record on appeal.

Morris Lavine at that time had been in Washington, where he had been arguing the case of *Republic of Mexico* v. *Hoffman* (.....), and A. W. Young was out of the state [R. 85].

Upon an affidavit of Mr. Burr the District Court issued an order, returnable on February 5, 1945, to A. W. Young to appear and show cause why he should not be held in contempt of court. The matter was continued to February 26, 1945, at which time Mr. Young appeared. The matter was continued without objection until July 5.

In the same court room prior to that time, there had been an indictment returned entitled *United States of America v. The Penfield Company*, No. 17,230-Crim. [R. 26]. That case had been tried over a period of several weeks, in which A. W. Young, Franklin Black, and The Penfield Company of California were all defendants on charges for violation of the Securities & Exchange Act of 1933 and the use of the mails in a scheme to defraud. During that period of time countless exhibits had been introduced before the trial judge, a list of which are attached as an appendix hereto. The clerk's list of the record of exhibits in that case, has been lodged with this court so that this court may have an idea of what the trial court had before it.

In addition to these exhibits, Henry F. Marlow, a former president of the company, who had jointly been indicted with Young, Black, and the company, became a Government witness. The case against him was dismissed and he produced in evidence nearly all of the documents sought by the Government under the subpoena *duces tecum*. In addition to his testimony, the Government had as a witness K. A. Shropshire of the Bourbon Sales Corporation, and all of the records of the Bourbon Sales Corporation, all of the bottling contracts and practically all of the transactions sought under the subpoena *duces tecum* were introduced.

After the trial had concluded, but before the filing of the notice of appeal, the agents for the Securities & Exchange Commission withdrew all of the exhibits mentioned so that we were not able to have them forwarded either to the Circuit Court of Appeals or to this Court to inspect and see that the order sought by the Securities and Exchange Commission had actually become moot.[1]

The criminal trial ended in acquittal of Young, Black and the Penfield Company. The trial court heard all of the evidence. Thereafter, on July 5, 1945, the defendant A. W. Young submitted affidavits showing that both he and his attorney were out of the city at the time [R. 82], and that neither of them were back in the city until February. Other than the letter there was no showing that Mr. Young had refused to let Mr. Burr see the books and records. All that Mr. Burr stated was that he was going to call, and that is all that he did. The

[1]We think in fairness to the District Court that the Securities and Exchange Commission should forward to this Court all of the records which had been produced in the criminal trial.

petitioner herein objected to predicating a contempt proceeding upon this basis [R. 82].

The Court, after examining the affidavit of defendant Young, stated:

> "The affidavit of the defendant Young indicates that he was absent from the city from January 11 to February 3, so the question now is whether or not his mere absence from the city is sufficient to exculpate him from the order of the Court.[2]
>
> I think that the order is pretty definite, and he should have made the books and records available to Mr. Burr, and even though he were absent from the city I think he should have made some provision so that the examination could have been had, because the order to produce the books and records was made in the alternative, to examine them at their office as an accommodation to the defendant in order to prevent him from having to physically bring the books and papers to the office and interrupt his business. I think the order is definite enough that it should have been obeyed.
>
> The question now is whether or not, as I have indicated, his absence from the city is sufficient to excuse him. I don't believe that it is, Mr. Lavine.

---

[2]Efforts have been made to locate the affidavits which were served upon opposing counsel and given to the court, but they seem to have been lost from the files. However, the record shows that the court had the affidavits before him.

I think that he should have provided some means or some person so that they could have been available.

* * * * * * * *

The Court: That will be the order of the Court, that he is guilty of contempt.

Are you ready for sentence?

Mr. Lavine: Yes Your Honor.

The Court: Come forward, Mr. Young.

Mr. Young: Might I say a word, Your Honor?

The Court: I think you had better talk to your counsel.

Mr. Lavine: Your Honor, the defendant wishes to point out to Your Honor that in connection with the matter he was not aware of the time at the time that the mandate came down as to what further proceedings might be had in connection with the matter and he was trying to make a living and went out of the city.

The Court: He had good counsel and if he had consulted him when the mandate came down I think he would have been advised of what he was obliged to do.

Mr. Lavine: Unfortunately I went out of the city too, Your Honor so we were both out of the city. I want Your Honor to take that into consideration.

The Court: Very well. The order will stand that the defendant be adjudged guilty of contempt.

Do you have anything to say in connection with the disposition of this matter Mr. Cuthbertson?

Mr. Cuthbertson: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a

look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refuses to produce his books and records for our inspection.

The Court: I don't think that I am going to be disposed to do anything like that. I sat here for six weeks and listened to books and records. The Government produced people from all over the United States in connection with the Penfield matter.

* * * * * * * * *

The Court: The Court can take judicial notice of its own books and records, * * *.

The judgment and sentence of the Court is that the defendant pay a fine of $50 and stand committed until paid." [R. 83-87.]

The petitioner paid his fine into the United States Treasury the next day.

The Securities and Exchange Commission filed an appeal from this order on September 24, 1945. However, it did not ever make application for allowance of an appeal as provided by Section 230 of Title 28, U. S. Codes.

The Circuit Court reversed (one judge dissenting) the order of the District Court, ordering that in addition to the fine that Young be imprisoned to compel his obedience to the order to produce the documents in question. "If he complies, or shows compliance is impossible, he must be released." [R. 98.]

Specification of Errors.

I.

The Circuit Court of Appeals erred in holding that it had jurisdiction to entertain the appeal.

II.

The Circuit Court of Appeals erred in endeavoring to impose its judgment in place of that of the District Court.

III.

There was no sufficient predicate for the District Court's order adjudicating the petitioner in contempt.

IV.

There was no showing on the part of the Commission as to a wilful refusal to obey the District Court's order on the date alleged, or that a demand had been made of Mr. Young and refused by him or anyone acting under his authority or supervision.

V.

The District Court has wide discretion in imposing its penalties in contempt proceedings. The Statute gives the District Court the alternative of either fine or imprisonment. The payment of the fine exhausts the jurisdiction of the Court to proceed any farther.

ARGUMENT.

I.

A.

The Circuit Court of Appeals Was Without Jurisdiction to Entertain the Appeal in the Absence of an Application for Allowance of an Appeal.

There was no application for allowance of an appeal as required by Title 28, Sec. 230, U. S. C.

The only proceeding taken by the Securities and Exchange Commission (appellants below) was a notice of appeal filed in the District Court. This was not a compliance with Section 8c of the Jurisdictional Act of February 13, 1925 (454, Title 936, 940, C. 229, Jan. 31, 1928, 45 Stat. *et seq.*, 54, C. 14; 28 U. S. C. A., Sec. 230) or with the requirements of Title 28, Sec. 230, U. S. C.

Nye v. U. S., 313 U. S. 33; 85 L. Ed. 1172;

McCrone v. U. S., 307 U. S. 61, 83 L. Ed. 1108;

Steevler v. U. S., 319 U. S. 39, 87 L. Ed. 1197;

Fox v. Capital Co., 299 U. S. 105, 108, 81 L. Ed. 67.

B.

The Circuit Court of Appeals Had No Jurisdiction Under Any Circumstances to Pass Upon the Questions Involved, Since the Statutory Requirements Had Not Been Complied With.

Jurisdiction of the Federal Courts to hear or entertain a case or to hear or entertain an appeal is governed by the granting or withholding of power by Congress by

Congress itself, and is not enlarged or changed by any rule of Court.

Yakus v. U. S., 321 U. S. 414, 88 L. Ed. 1834;
Bowles v. Willingham, 321 U. S. 503, 88 L. Ed. 892.

C.

If the Appeal Be Deemed Criminal Then, as Punishment for Violation of the Court's Order, Then the Time Had Long Passed When Notice of Appeal Could Be Filed. Under the Rules as Then Existed This Was Five Days After Judgment.

Criminal Appeals Act, 18 U. S. C. A. 682;
Rules of Criminal Procedure After Verdict;
U. S. v. Hark, 320 U. S. 531, 88 L. Ed. 290.

In any event no exception was taken by the SEC. In fact it cannot be said that its attitude arose even to the dignity of an objection. As the payment of the fine was stayed 24 hours no effort was made during this period to get a different order. There was thus a complete waiver on the part of the government if it be said to have any rights.[3]

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[3]The order of the Circuit Court was erroneous also because jurisdiction had been exhausted in the District Court by the failure of the counsel for the SEC either to object to the order of the Court or take an exception from the District Court's order. Actually, all that transpired after the court was about to pronounce judgment, the attorney for the SEC said, Mr. Cuthbertson: "So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose

D.

The Circuit Court of Appeals Erred in Endeavoring to Impose Its Judgment in Place of That of the District Court.

The District Court is given jurisdiction under Title 28, Sec. 385, to impose punishment for a violation of its orders. Its discretion is inherent in the District Court and is limited only by the statutes and applicable decisions.

Nye v. U. S., 313 U. S. 33, 85 L. Ed. 1172.

If it imposes punishment by way of a fine, its judgment is punitive or criminal, and there then arises a question as to whether under the facts of this case the appeal was timely in any event in the light of this Court's decision in *Steever v. U. S.*, 319 U. S. 39, 87 L. Ed. 1197, and Title 18, Section 682, Criminal Appeals Act.

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would be in connection with or so long as he refuses to produce his books and records for our inspection."

The Court: "I don't think that I am going to be disposed to do anything like that. . . ."

The Court, after imposing the fine with an order that the defendant was to stand committed until paid, stayed the execution of the fine until the following day. No exception was noted by the attorneys for the Government nor was any application made to the Court to impose a different judgment than the one which it had imposed. This constituted a failure to assert any rights, and in fact, constituted a waiver of any claimed rights. The Government, equally with defendants, may waive its rights, which surely, waivers do not exist on one side alone. This Court has held that such fundamental rights as the right to be represented by counsel are waived by a failure to assert them.

This Court has also asserted that consent to an inspection constitutes a waiver of constitutional rights against search and seizures.

Zap v. United States, 90 L. Ed. 327 U. S.

II.

The Circuit Court of Appeals Erred in Holding That It Had Jurisdiction to Entertain the Appeal After the Defendant Had Paid the Fine.

This Court has held in civil cases that the order of the District Court relating to a contempt proceeding is not an appealable order. The payment of the fine in any event exhausted the jurisdiction of the District Court and of all other courts.

In re Bradley, 318 U. S. 50; 87 L. Ed. 608;

Ex Parte Lange, 18 Wall. (U. S.), 163, 176, 21 L. Ed. 872, 878.

The powers to impose punishment for contempt which are conferred in the Securities and Exchange Commission Act upon the District Court must be read in connection with Title 28, Sec. 385, with reference to contempt procedings. That Statute gives the District Court jurisdiction to either impose a fine or to commit a person to jail. It does not give authority to do both; nor does the Statute confer the power upon the Securities and Exchange Commission to impose the kind and type of punishment which the Securities and Exchange Commission desires.

If the Securities and Exchange Commission, or any other Commission, had that authority, it would make the District Court a mere rubber stamp for the Commission to impose its specific order.

Just as Congress has not given the power to Commissions to hold hearings to enforce its subpoenas (see *Cudahy Packing Co. v. Holland*, 315 U. S. 357, 86 L. Ed.

895), so Congress has not seen fit to give the Commission the power to suggest the kind or type of punishment which might be imposed in a particular case. That power has been vested in the District Courts of the United States, who have full opportunity to get all of the facts, hear all of the evidence, and determine what law and justice require under the particular facts of the case. That was done in this case. The Court had before it everything that might aid it in the determination of the proper punishment. The Court had heard the first proceeding on the application for the subpoena; had heard the criminal trial and saw countless witnesses; had heard all of the evidence involved in that proceeding, and thereafter had heard the contempt proceeding. It imposed a judgment accordingly. That judgment was imposed in accordance with its powers under Title 28, Sec. 385. Having done so it exhausted its jurisdiction.

Nor was there any right of appeal by the Commission from the exercise of the District Court of its admitted jurisdiction. The Commission had sought the District Court's order. *It was the order of the District Court, not that of the Commission, out of which the contempt arose.* That was the authority in the Act granted by Congress. The Commission seeks to transfer that authority from the Court to itself, but if that authority is to exist the application should be made to Congress and not to the courts.

III.

There Was No Sufficient Predicate for the District Court's Order Adjudicating the Petitioner in Contempt.

As a predicate for an order adjudging a person in contempt, we deem the following to be essential:

1. A lawful order of the Court.
2. Notice of personal service of the order of the Court.
3. Lawful disobedience of the orders of the Court after notice.
4. Notice of and a hearing thereon.

1. Lawful order of the Court:

That the Court had issued a lawful order permitting an inspection of the books and records is complete, no doubt; but the date of the original order was June 1st, 1943. The date fixing the new order of inspection was not fixed by any order of the court but was fixed by a letter of Charles R. Burr, Assistant Regional Administrator of the Securities and Exchange Commission, R-9, 10. In so far as the date of January 24, 1945, was concerned, there never was any order *of the Court* fixing that date as the date to permit inspection nor was there any showing that this letter had ever been received by Mr. Young or by his attorney. It was not served personally. The record affirmatively shows on the other hand that Mr. Young was out of the City from January 11 to February 3 [R. 83] and that his attorney, Morris Lavine, who was then his only attorney of record, was out of the city in Washington, D. C., concerning a matter before the Supreme Court of the

United States. [R. 85.] There is nothing in the affidavit of Mr. Burr as to what address he called at in connection with the Penfield Company of California [R. 7] or who he saw or talked to or that he ever made a demand personally upon Mr. Young.

Rule 45(C) provides the method of service of a subpoena as follows:

> "A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered."

Since the order of June 1st, 1943 to compel the obedience to a subpoena *duces tecum* had long passed, the new order and date should have been fixed by an application to the trial judge who issued the original order and should have been personally served upon the respondent. Without such a procedure and without such personal service, it is respectfully submitted that there was under no circumstances a sufficient predicate for the finding of an order for contempt or for the subsequent order of the Circuit Court "requiring Young's imprisonment to compel his obedience to the order to produce the documents in question."

We are not foreclosed in raising these matters in defense against an order of imprisonment.

U. S. v. Curtis Wright Export Co., 299 U. S. 304, 81 L. Ed. 255;

Langnes v. Green, 282 U. S. 535, 75 L. Ed. 520.

IV.

There Was No Showing on the Part of the Commission as to a Wilful Refusal to Obey the District Court's Order on the Date Alleged, or That a Demand Had Been Made of Mr. Young and Refused by Him or Anyone Acting Under His Authority or Supervision.

A contempt has been defined as "wilful disregard or disobedience of public authority."

Melton v. Com., 160 Ky. 642, L. R. A. 1915B, 689;

Worden v. Searls, 121 U. S. 14, 30 L. Ed. 853.

Intent to commit contempt is usually necessary.

State ex rel. Webb v. District Ct., 37 Mont. 191, 195.

There certainly could be no intent to commit a contempt where no order of the Court was served in connection with the new date or where there had been no personal service or where the petitioner was out of the City and had never received any prsonal service or notice and there was no showing that he had refused to obey the order.

V.

The District Court Has Wide Discretion in Imposing Its Penalties in Contempt Proceedings. The Statute Gives the District Court the Alternative of Either Fine or Imprisonment. The Payment of the Fine Exhausts the Jurisdiction of the Court to Proceed Any Farther.

Title 28, Section 385, gives the District Court wide discretion in imposing its penalties. It would appear that the Court's determination as to the character of the proceedings for contempt determined the proceedings.

State ex rel. Rodd v. Verage, 177 Wis. 295, 187 N. W. 830, 23 A. L. R. 491.

The purpose of the punishment rather than the character of the act punished determines whether the proceeding to punish is for a civil or a criminal contempt.

Lamb v. Cramer, 285 U. S. 217, 76 L. Ed. 715.

Here the Court imposed a fine. It does determine that it wished to impose a punishment. When he did so, and when the fine was paid, the Court's jurisdiction was exhausted.

In Re Bradley, 318 U. S. 50, 87 L. Ed. 608.

The Circuit Court of Appeals in its decision ordered the District Court to impose another order or judgment in addition to the judgment already pronounced by the District Court. This was erroneous for three reasons:

1. The payment of the fine in the District Court exhausted jurisdiction of the Court.

In re Bradley, 318 U. S. 50, 87 L. Ed. 608, Title 28, Sec. 385 U. S. C., which only authorizes the Court to impose either a fine or imprisonment, and not both.

2. The Circuit Court of Appeals was without power to tell the District Court what kind or character of punishment should be imposed for a violation of its (the District) Court's order.

This was not changed by calling the case a civil contempt proceeding or a proceeding to enforce an order of the Securities and Exchange Commission. Congress has given that function to the District Court alone.

3. The District Court in reaching its judgment as to the punishment that it wished to make with reference to the matter had before it the entire case, both civil and criminal, and was best in a position to exercise its judgment regarding the character or kind of punishment that it wished to impose for a violation of its order.

This it did. That ended the matter.

For each and all of these reasons, it is respectfully urged that the judgment of the District Court be affirmed and the judgment and order of the Circuit Court of Appeals be reversed.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners.

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No. 453

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE PENFIELD COMPANY OF CALIFORNIA AND A. W. YOUNG, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals, as amended (R. 95–99; Pet. 18), has not yet been officially reported. The district court rendered no opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 25, 1946 (R. 100), and rehearing was denied on July 16, 1946 (R. 99). The petition for a writ of certiorari was filed on September 3, 1946. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), made applicable by Section 22 (a) of the Securities Act of 1933 (15 U. S. C. 77 v (a)).

QUESTIONS PRESENTED

1. Whether, in a contempt proceeding instituted by the Securities and Exchange Commission to obtain compliance with a subpoena enforcement order, it was reversible error for the district court, after adjudging the contempt, to fail to commit the contemnors until they complied with the order of enforcement, and, instead, to impose a nominal fine not requested by the Commission.[1]

2. Whether, in view of the failure of the contemnors to appeal from the judgment of the district court, they have standing to challenge the sufficiency of the evidence to support the finding of contempt.

3. Whether the controversy has become moot because of the possibility that the petitioners' delay in compliance may render the Commission's inquiry fruitless.

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[1] The order adjudging the contempt was directed at petitioner Young as secretary-treasurer of the Penfield Company (R. 19). Both Young and the Company were, without objection, designated as appellees in the court below (R. 87) and both have filed the petition for a writ of certiorari. It is for these reasons that we shall refer, throughout this brief, to the "contemnors" and the "petitioners."

STATUTE INVOLVED

The applicable provisions of the Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77 (a), *et seq.*) (the "Act") are set forth in the Appendix, *infra,* pp. 15–16.

STATEMENT

The Commission, pursuant to Section 20 (a) of the Act, Appendix, *infra,* p. 15, issued an order on May 14, 1942, and supplemental orders on February 13, 1943, and April 8, 1943, directing an investigation to determine whether a number of specified companies and persons (petitioners being added in the April 1943 supplemental order) had violated Sections 17 (a) and 5 (a) of the Act (15 U. S. C. 77 q (a) and 77 e (a)). The inquiry related to the possible sale of stock and other securities of petitioner, The Penfield Company of California ("Penfield"), by means of untrue statements of material facts and without registration (R. 2–3, 7; see *Penfield Co. of California* v. *Securities and Exchange Commission,* 143 F. 2d 746, 747–8 (C. C. A. 9), certiorari denied, 323 U. S. 768). In the course of this investigation, and pursuant to Section 19 (b) of the Act, Appendix, *infra,* p. 15, the Commission directed a subpoena *duces tecum* to petitioner Young, as an officer of Penfield (R. 3–4). The supboena required the production of certain books and records of Penfield covering the four-year period from May 1, 1939, to the date of the subpoena, April 9, 1943. See *Penfield Co. of*

California v. *Securities and Exchange Commission*, 143 F. 2d 746, 748. Upon Young's refusal to appear and produce the specified books and records, the Commission, on April 13, 1943, filed an application in the district court for an order enforcing the subpoena (R. 2, 4; see R. 79).

On June 1, 1943, after hearing, the court granted the Commission's application, specifically ordering Young, as secretary-treasurer of Penfield, to produce the specified items on June 8, 1943, and at any adjournment dates; and further ordered, pursuant to a stipulation by the parties, that the books and records, in lieu of their physical production at the office of the Commission, should be made available in the office of Penfield to such officer and employees of the Commission as might be designated for such purpose (R. 4–5, 11–15; see R. 3, 7–8). Penfield appealed from this order and, on June 30, 1944, the Circuit Court of Appeals for the Ninth Circuit affirmed. 143 F. 2d 746. A petition for a writ of certiorari was denied by this Court on November 6, 1944. 323 U. S. 768. On November 13, 1944, the mandate of the circuit court of appeals was issued, affirming said order of June 1, 1943, and, on December 7, 1944, that mandate was filed and spread upon the minutes of the district court (R. 5).

Thereupon, a designated officer of the Commission, on January 16, 1945, addressed and mailed a communication to Young and his attorneys ad-

vising that this officer would call at the office of Penfield in Los Angeles on January 24, 1945, for the purpose of examining the books and records referred to in the district court's order of June 1, 1943 (R. 6, 9–10; see R. 80). On January 24, 1945, the said officer and another designated officer of the Commission presented themselves at the office of Penfield and demanded to see the specified books and records but such demand was refused (R. 6–7).

On January 24, 1945, the Commission instituted civil contempt proceedings against Young by filing, in the district court, a proposed rule to show cause why Young should not be adjudged in contempt, together with an affidavit in support of the rule (R. 2–15).[2] The district court declined to issue the rule immediately but, instead, directed Young to show cause on February 5, 1945, why a further order should not be made directing Young to show cause why an order should not be made

[2] Petitioners incorrectly state (Pet. 4) that this affidavit was dated January 23, 1945, the day before the events therein referred to took place. As the record shows, the affidavit was dated January 24, 1945, the date of institution of the proceedings (R. 7). The court's order issued on that date is, however, misdated January 23, 1945 (R. 93–94). That this order was issued on January 24, 1945, is made clear by the reference in the order to the supporting affidavit which was verified on January 24, 1945 (R. 7, 15). Further, the district court order of February 8, 1945, refers to the "order issued by this Court on January 24, 1945, directing A. W. Young * * * to show cause * * *" (R. 17; see also R. 80, 81).

holding him in contempt of court (R. 15–16; 31). After hearing both sides on February 8, 1945, the court expressed doubt as to whether the Commission should obtain the evidence sought until after the conclusion of a pending criminal trial involving Young, Penfield and others (R. 72–73).[1] The court issued an order to show cause returnable on February 26, 1945 (R. 17–18), and stated that it would on that date decide whether or not to proceed with the contempt proceedings or postpone the matter until after the criminal trial (R. 76).

On February 26, 1945, the district court, over objection of Commission counsel, postponed the hearing on the order to show cause to May 28, 1945, then to June 25, 1945, and then to July 2, 1945, when the matter finally came on to be heard (R. 80–81), and, on that date, the court adjudged Young to be in contempt, but refused to grant a remedial decree calculated to coerce production of Penfield's books and records (R. 86). Instead, the court ordered Young merely to "pay a fine of $50, and stand committed until paid", with execution stayed temporarily, presumably to give Young an opportunity to pay the $50 (R. 87).

[1] This trial was upon an indictment returned in the District Court for the Southern District of California on September 29, 1944 (No. 17230), charging violations of the Securities Act (Section 17 (a) (1), 15 U. S. C. 77q (a) (1)), the mail fraud statute, and the conspiracy statute (see R. 28, 32–33, 47).

Young did not appeal from the order holding him in contempt, and paid the $50 fine (R. 96). On appeal by the Commission from the order fining Young (R. 20),[4] the circuit court of appeals, one judge dissenting without opinion, reversed that order and remanded the case to the district court "for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question" (R. 98).

ARGUMENT

1. Petitioners contend (Pet. 12) that the contempt proceeding was criminal in nature. They therefore argue that the criminal penalty imposed upon Young was within the discretion of the district court and was consequently not appealable by the Commission (Pet. 9–10, 11, 14).[5] This

[4] Petitioners comment on the fact that the Commission "waited" until September 26, 1945, to file its notice of appeal (Pet. 5). While it does not appear in the record, it may not be amiss to point out that in the interim, on August 27, 1945, the Commission filed a motion in the circuit court of appeals for leave to file a petition for a writ of mandamus directed to the district court. The motion was denied without opinion on September 13, 1945. *Securities and Exchange Commission* v. *Hall.*

[5] Petitioners cite Section 22 (b) of the Securities Act, Appendix, *infra*, pp. 15–16, which provides that failure to obey a subpoena enforcement order "may be punished * * * as a contempt thereof," and Section 268 of the Judicial Code (28 U. S. C. 385), which empowers the courts "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority." These provisions, however, have general applicability to both civil and criminal contempts and merely declare the power of the courts to punish for contempt.

contention has no merit. As the court below held, the proceeding was one for civil contempt (R. 96). It was captioned as a civil action (R. 2, 11, 25), was called on the civil calendar (R. 77), and counsel for the Commission stated that the proceeding was for civil contempt (R. 35–39, 43, 77).[6] It meets the tests laid down by this Court in determining that a contempt proceeding is civil in character. *McCrone* v. *United States*, 307 U. S. 61, 64; and see *McCann* v. *New York Stock Exchange*, 80 F. (2d) 211, 214 (C. C. A. 2), certiorari denied, 299 U. S. 603. It was a continuation of the earlier civil action in the district court to enforce the Commission's subpoena (see R. 77–78), and was a step in the enforcement of the district court's order of June 1, 1943. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444–445; and see *Parker* v. *United States*, 153 F. 2d 66 (C. C. A. 1); *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302, 305 (C. C. A.); cf. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 470.[7] That being so, the district court

[6] Petitioners' counsel recognized the civil nature of the proceeding by citing the Rules of Civil Procedure to support one of his contentions at the February 8, 1945, hearing in the district court (R. 21).

[7] The cases relied upon by petitioners (Pet. 8) do not conflict with these principles. In *Stewart* v. *United States*, 236 Fed. 838 (C. C. A. 8), the contempt case was prosecuted by the United States Attorney and was treated by the court and parties as a criminal contempt proceeding to vindicate the authority of the court. *Ex parte Grossman*, 267 U. S. 87, merely holds that the pardoning power of the President

had no discretion but to impose a remedial, coercive sanction designed to compel compliance with the mandate of the circuit court of appeals. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 449; *Parker* v. *United States*, 153 F. 2d 66 (C. C. A. 1). Since the order of June 1, 1943, required performance of an affirmative act, namely, the production of Penfield's books and records, the appropriate means for securing compliance, as held by the court below (R. 96), is imprisonment unless and until the order is complied with. See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. at 422.

Petitioners suggest (Pet. 6–7), but do not argue, that the district judge could, in disposing of the contempt, take into consideration the "fact", judicially known to him, that "nearly all" the records designated in the order enforcing the subpoena had been produced before him in the criminal trial. But there is nothing in the record to support this claim. And in the proceedings before the district court, counsel for the petitioners made no claim that the records in question had been produced at the trial of the criminal case, and the district court did not base its decision on any such ground (R. 86–87). In any event, the Commission is entitled to see *all* of the records referred to in the subpoena enforcement order.

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under the Federal Constitution "for offenses against the United States" extends to criminal contempts of court. The other cases cited in this connection by petitoners are discussed *infra*, pp. 9–10.

Petitioners' contention that the jurisdiction of the court was exhausted upon payment of the fine by petitioner Young (Pet. 11), is based upon the decisions of this Court in *In re Bradley*, 318 U. S. 50, and *Ex parte Lange*, 18 Wall. 163. These cases hold that where a statute provides for a sentence of fine *or* imprisonment in a criminal proceeding, and the court erroneously imposes a sentence of fine *and* imprisonment, and the fine is paid, the sentence cannot be changed to one of imprisonment and the defendant must be discharged. These decisions rest upon the principle that a person, having satisfied "one valid alternative provision of the original sentence" (318 U. S. at 52), cannot be again punished for the same offense. This principle has no application in a civil contempt proceeding in which the sentence that has been imposed is clearly invalid.

2. Petitioners contend that Young never disobeyed the subpoena enforcement order of the district court since no order demanding the Penfield records on a "specific date" was "validly served upon him" (Pet. 13). But this objection constitutes an attack upon the district court's judgment of contempt from which petitioners did not appeal. This issue was fully litigated in the district court and was decided adversely to the petitioners. The correctness of this finding was not brought before the circuit court of appeals for review and petitioners are therefore fore-

closed from raising the question in this Court. *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191. In any event, the record shows that petitioners were fully apprised, both directly and through counsel, that the court's order directing them to produce was again operative following their unsuccessful appeal therefrom, and that the Commission was seeking compliance. The letter of notification, which was mailed on January 16, 1945 (R. 6, 9–10; see R. 80), advised them of the filing in the district court of the mandate of the circuit court of appeals. Enclosed in the letter was a copy of the subpoena enforcement order (R. 6, 9, 10–15). The request in the letter conformed to the provisions of that order that the records "shall be made available to such officer and employees of Securities and Exchange Commission as may be designated, at the office of Respondent [Penfield] * * *" (R. 14). If a demand were necessary,* it seems clear that this letter and the enclosures met that requirement. The Federal Rules of Civil Procedure permit service of notices upon the attorney representing the party and such service may be made by mail. Rule 5 (b). See *National Labor Relations Board* v. *Hopwood Re-*

*It is at least arguable that no formal demand was necessary, and that petitioners were under a positive duty to comply with the mandate (see R. 80), which was issued more than two months before the request was made, and filed in the district court over a month before (R. 5).

tinning Co., 104 F. 2d 302 (C. C. A. 2); *Tilghman* v. *Tilghman*, 57 F. Supp. 417 (D. C. D. C.). The court having acquired jurisdiction over the person of petitioner Young, no further process was required. *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 454. Petitioners, however, assert that Young and his present counsel were in fact out of town from a date prior to the mailing of the letter of January 16, 1945, until after the Commission's officer called at the office of Penfield to see the books. However, they apparently were in town when the mandate was issued and filed and could have made the necessary arrangements to comply (See Pet. 3–4; R. 80). Moreover, the letter did come to the attention of co-counsel for petitioners in the district court proceeding (R. 65). Young could have been reached in ample time. Consequently, the record justifies the finding of the district court that Young's absence from the city was an inadequate excuse (R. 84).

3. Petitioners have done no more than to raise the question whether the Commission's "demand [is] a moot question more than three years after the period covered by the order, and after the corporation has ceased actively to function" (Pet. 6). Petitioners' reference presumably is to the three-year period of limitation (Act of December 27, 1927, 45 Stat. 51, 18 U. S. C. 582) on criminal prosecutions under the Securities Act (Section 24,

15 U. S. C. 77x). It is evident that the demand for the production of the records did not give rise to a moot question. Penfield's records may furnish leads to the discovery of later violations, and other proceedings not subject to this limitation are still open: the facts disclosed by the books alone or in conjunction with other evidence might justify injunctive proceedings by the Commission (R. 67–68) or administrative proceedings before the Commission (R. 45).

There is nothing in the record to indicate that Penfield has "ceased actively to function" (Pet. 6). Even if that were the fact, we fail to see its relevance. Dormancy of the company cannot preclude action against petitioners or any other companies or persons who may be shown to have violated the Act (R. 48, 75). The Commission's orders for investigation herein specifically recite as being under investigation a number of persons other than petitioners (R. 7–8).

Moreover, it does not lie in the mouths of petitioners to object to enforcement of the district court's order on the ground of the possible fruitlessness of the inquiry when their own obstructive tactics have thus far prevented examination of the books. Certainly, petitioners' contumacy makes it all the more important that the Commission be given every opportunity to scrutinize the books and records for such evidence as they may afford in aid of its investigation. The

delay caused by Young's disobedience should not result in any restrictive "forecasts of the probable result of the investigation." *Blair* v. *United States*, 250 U. S. 273, 282.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1946.

APPENDIX

Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77a, *et seq.*):

SEC. 19. (b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

SEC. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

SEC. 22. (b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which

said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

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No. 453

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE PENFIELD COMPANY OF CALIFORNIA AND A. W. YOUNG, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINION BELOW

The opinion of the circuit court of appeals, as amended (R. 95–98), is officially reported in 157 F. 2d 65. The district court rendered no opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 25, 1946 (R. 100), and rehearing was denied on July 16, 1946 (R. 99). The petition for a writ of certiorari was granted on November 18, 1946. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347), made applicable by Section 22 (a) of the Securities Act of 1933 (15 U. S. C. 77v (a)).

QUESTIONS PRESENTED

Upon application of the Securities and Exchange Commission, petitioners were ordered to produce specified books and records relating to an investigation being conducted by the Commission. Petitioners refused to comply with this order, even after it was affirmed on appeal. The Commission thereupon moved the district court to enter a decree of contempt for the purpose of securing compliance with the subpoena order. The district court, although finding petitioners in contempt, refused a coercive decree calculated to obtain compliance; instead, it imposed an unconditional fine of $50. On appeal, the circuit court of appeals held that the district court's action frustrated the "remedial purpose of the legislation creating the right to secure access to the documents," and accordingly instructed the district court to enter an order requiring petitioner Young's imprisonment, conditional upon his compliance with the subpoena order.[1]

[1] The order adjudging the contempt was directed at petitioner Young as secretary-treasurer of the Penfield Company (R. 19). Both Young and the Company were, without objection, designated as appellees in the court below (R. 87) and both filed the petition for a writ of certiorari.

The principal question presented is whether, in these circumstances, the court below (a) had the power to review the refusal of a coercive decree, and (b) properly exercised its supervisory jurisdiction to correct the disposition of the case made by the district court. A subsidiary question is whether, in view of petitioners' failure to proffer compliance upon their appearance in the contempt proceedings and their failure to appeal from the judgment of the district court holding Young in contempt, petitioners may now question the adequacy of the notice given by the Commission of the new date for production of the records; and assuming this question to be still open, whether petitioners did not have sufficient notice thereof.

STATUTES INVOLVED

The applicable provisions of the Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77 (a), *et seq.*) (the "Act") and Section 268 of the Judicial Code (28 U. S. C. 385) are set forth in the Appendix, *infra*, pp. 37–38.

STATEMENT

The Commission, pursuant to Section 20 (a) of the Act, Appendix, *infra*, p. 37, issued an order on May 14, 1942, and supplemental orders on February 13, 1943, and April 8, 1943, directing an investigation to determine whether a number of specified companies and persons (petitioners being added in the April 1943 supplemental order) had violated Sections 17 (a) and 5 (a) of the Act (15

U. S. C. 77q (a) and 77e (a)). The inquiry related to the possible sale of stock and other securities of petitioner, The Penfield Company of California ("Penfield"), by means of untrue statements of material facts and without registration (R. 2–3, 7; see *Penfield Company of California* v. *Securities and Exchange Commission*, 143 F. 2d 746, 747–8 (C. C. A. 9), certiorari denied, 323 U. S. 768). In the course of this investigation, and pursuant to Section 19 (b) of the Act, Appendix, *infra*, p. 37, the Commission directed a subpoena *duces tecum* to petitioner Young, as an officer of Penfield (R. 3–4). The subpoena required the production of certain books and records of Penfield covering the four-year period from May 1, 1939, to the date of the subpoena, April 9, 1943. See *Penfield Co. of California* v. *Securities and Exchange Commission*, 143 F. 2d 746, 748. Upon Young's refusal to appear and produce the specified books and records, the Commission, on April 13, 1943, filed an application in the district court for an order enforcing the subpoena (R. 2, 4; see R. 79).

On June 1, 1943, after hearing, the court granted the Commission's application, specifically ordering Young, as secretary-treasurer of Penfield, to produce the specified items on June 8, 1943, and at any adjournment dates; and further ordered, pursuant to a stipulation by the parties, that the books and records, in lieu of their physical production at the office of the Commission, should be made available in the office of Penfield to such

officer and employees of the Commission as might be designated for such purpose (R. 4–5, 11–15; see R. 3, 7–8). Penfield appealed from this order and, on June 30, 1944, the Circuit Court of Appeals for the Ninth Circuit affirmed. 143 F. 2d 746. A petition for a writ of certiorari was denied by this Court on November 6, 1944. 323 U. S. 768. On November 13, 1944, the mandate of the circuit court of appeals was issued, affirming the subpoena order of June 1, 1943, and, on December 7, 1944, that mandate was filed and spread upon the minutes of the district court (R. 5).

Despite the mandate of the circuit court of appeals, petitioners persisted in their non-compliance with the subpoena enforcement order. On January 16, 1945, an officer of the Commission designated by it for that purpose addressed and mailed communications (1) to Young at the office of Penfield, and (2) to all counsel of record who had appeared for defendants in the subpoena enforcement proceeding and the appeal therefrom. This communication advised petitioners of the filing in the district court of the circuit court of appeals' mandate and stated in accordance with the district court's order of June 1, 1943, that this officer would call at the office of Penfield in Los Angeles on January 24, 1945, for the purpose of examining the books and records referred to in the order. A copy of the order was enclosed in the letter (R. 6,

9–15; see R. 80). On January 24, 1945, the said officer and another designated officer of the Commission presented themselves at the office of Penfield and demanded to see the specified books and records. Such demand was refused. (R. 6–7)

On January 24, 1945, the Commission instituted civil contempt proceedings against Young by filing, in the district court, a proposed rule to show cause why Young should not be adjudged in contempt, together with an affidavit in support of the rule (R. 2–15). The district court declined to issue the rule immediately but, instead, issued an order directing Young to show cause why a further order should not be made directing Young to show cause why an order should not be made holding him in contempt of court (R. 15–16; 31).[2]

Petitioners appeared through counsel at the hearing on February 8, 1945, as to whether an order to show cause should issue, but made no offer to produce the books or make them available to the Commission nor made any showing of inability to produce the books. Instead, peti-

[2] This order of the court was issued on January 24, 1945, but is misdated January 23, 1945 (R. 93–94). That this order was actually issued on January 24, 1945, is made clear by the reference in the order to the affidavit which was verified on January 24, 1945, and was filed in support of the rule to show cause (R. 7, 15). Further, the district court order of February 8, 1945, refers to the "order issued by this Court on January 24, 1945, directing A. W. Young * * * to show cause * * *" (R. 17; see also R. 80, 81).

tioners asserted that in view of the pendency of a certain criminal case, they should not be compelled to produce the corporate records for examination by the Commission (R. 32-33). Counsel appearing for petitioners, along with Mr. Lavine, their present counsel, stated that he was more familiar with the facts than Mr. Lavine as he had received the letter from the Commission's designated representative in the absence of Mr. Lavine (R. 64–65, 71), offered various technical comments upon the adequacy of the notice, and suggested lack of proof that Mr. Young had knowledge of it (R. 65–67). It was also urged that service of the order to show cause was improper because mailed to counsel of record and not served upon petitioners by the marshal (R. 27, 30; cf. R. 16–17).

After extensive argument, the court expressed doubt as to whether the Commission should obtain the subpoenaed records of the corporation until after the conclusion of the pending criminal case involving Young, Penfield and others.[3] The court apparently believed that the Commission would not be entitled to make information so obtained available to the prosecution and

[3] This trial was upon an indictment returned in the District Court for the Southern District of California on September 29, 1944 (No. 17230), charging violations of the Securities Act (Section 17 (a) (1), 15 U. S. C. 77q (a) (1)), the mail fraud statute, and the conspiracy statute (see R. 28, 32–33, 47).

feared that this would result if petitioners were required to obey the subpoena (R. 72–73). The court, addressing Commission counsel, also stated that the same records were sought in the criminal case (see note 3, *infra*) and that "in view of the fact you have returned an indictment against the defendants, the urgency of the statute of limitations against them has now passed in the criminal matters" (R. 72). At the conclusion of this hearing, the court issued an order to Young to show cause why he should not be held in contempt, returnable on February 26, 1945 (R. 17–18), and stated that it would on that date decide whether or not to proceed with the contempt proceedings or postpone the matter until after the criminal trial (R. 76). The court made these statements despite the urging of Commission counsel that present enforcement was necessary because examination of the corporate records by the Commission could uncover later or additional criminal violations by the same or other defendants, and that, in any event, examination of the corporation's records might result in providing evidence which would justify other proceedings of a civil or administrative nature and which should not be delayed by the pendency of the criminal case (R. 45, 47–48). At this hearing, Commission counsel repeatedly urged that the sole objective of the Commission was to secure a coercive

order which would enable it to see the books (R. 35, 37, 43, 45, 64).

On February 26, 1945, the district court apparently decided that the records should not be made available during the pendency of the criminal case and postponed the hearing on the order to show cause. The postponement was until May 28, 1945, then to June 25, 1945, and then to July 2, 1945.[4] The decision of the district court to delay action on the contempt proceeding until after disposition of the criminal trial was rendered over vigorous objection voiced by Commission counsel at the February 8 hearing (R. 72–73, 75). As the record indicates, the basic issue to be decided at the February 26 hearing was whether or not the court would hear the contempt

[4] On June 1, 1945, the same court had directed a verdict of acquittal of some of the defendants in the criminal trial, including the present petitioners. Petitioners state in their brief (p. 6) that Marlow, who became a Government witness in the criminal proceeding, produced in evidence "nearly all" of the documents sought by the Government in the subpoena, which subpoena was stated to have been identical with the Securities and Exchange Commission subpoena involved in the present proceeding (R. 32–33, 72). It is not claimed, however, that all of the documents were produced and there is every inference to the contrary from the statements made on behalf of petitioners at the contempt hearings (see R. 33, 51, 68, 75). Such a claim could hardly be made in view of petitioners' three and one-half years' resistance to compliance with the Commission's subpoena.

issue or postpone it until after the trial of the criminal case (R. 76).

When the matter finally came on to be heard on July 2, 1945, almost six months after the Commission first moved for an order to show cause in the contempt proceeding, the court considered the affidavits submitted by both sides (R. 77, 78–79), offered petitioners an opportunity to cross-examine the affiant on behalf of the Commission (R. 83), heard argument, and adjudged Young to be in contempt (R. 85), but refused to grant a coercive decree calculated to coerce production of Penfield's books and records (R. 86). Instead, the court unconditionally ordered Young merely to "pay a fine of $50, and stand committed until paid", with execution stayed temporarily, presumably to give Young an opportunity to pay the $50. At the same time the court gave clear indication that it was not going to compel production of Penfield's records (R. 86–87). Young promptly paid the $50 punitive fine (R. 96) and did not appeal from the order holding him in contempt. After the Commission filed its notice of appeal (R. 20) and after expiration of the time for appeal, petitioners purported by a statement in the brief in the court below to assert a cross-appeal. This purported cross-appeal was later withdrawn by a document filed in the court below.

Holding that "refusal to commit until the order is obeyed, frustrates the remedial purpose of the

legislation creating the right to secure access to the documents" (R. 96–97), the court below reversed the order imposing the $50 fine and remanded the case to the district court "for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question" (R. 98).[5] No mandate has yet been issued.

SUMMARY OF ARGUMENT

The Commission, in the performance of its investigative functions under the Securities Act of 1933, was entitled to the aid of the district court in obtaining access to the subpoenaed books and records of Penfield. The district court's obligation to aid the Commission in the discharge of its statutory functions is at least equally applicable to compelling obedience to the court's own subpoena enforcement order as to issuing such an order in the first instance. Accordingly, the Commission having instituted civil contempt proceedings, the district court erred in assuming that it had unfettered discretion to withhold a coercive decree and to impose in lieu thereof an unconditional fine of $50 not sought by the Commission. Such an order could have no appreciable coercive effect, and when coupled with the indica-

[5] Petitioners state (Br. 9) that the direction for conditional imprisonment was "in addition to the fine." No such statement appears in the opinion of the court below, which, on the contrary, is one of reversal of the order imposing the fine (see pp. 26–27, *infra*).

tion that the court did not expect future compliance, was reviewable like any other order denying the relief to which a civil complainant is legally entitled.

In the circumstances of this case, including the long delay, the continued resistance of petitioners, despite affirmance of the order on the first appeal, and the total failure of the district court to exercise any discretion in the determination of what coercive remedy would be appropriate, it was proper for the court below, in the exercise of its supervisory jurisdiction, to direct a decree of conditional imprisonment to compel production of the records of [illegible]field. There is no merit to petitioner's contention that an unconditional fine having been imposed and paid, Section 268 of the Judicial Code (28 U. S. C. 385) deprives the district court of jurisdiction to impose a coercive decree of conditional imprisonment to prevent continuation of petitioners' contempt.

Petitioner's objection to the sufficiency of the notice fixing a new date for the production of the records after the mandate of the circuit court of appeals affirming the order was filed, constitutes an attack upon the judgment of contempt from which petitioners did not appeal. Indeed, this objection is inconsistent with their appearance in the proceeding and continued resistance and their plea that the judgment of the district court should be affirmed. In any case, the record clearly shows that sufficient notice was given.

ARGUMENT

I

FAILURE OF THE DISTRICT COURT TO ENTER A COERCIVE DECREE SOUGHT BY THE COMMISSION FRUSTRATES THE PURPOSE OF THE ACT NO LESS THAN A REFUSAL IN THE FIRST INSTANCE TO ENFORCE AN ADMINISTRATIVE SUBPOENA, AND THE COURT BELOW WAS WARRANTED IN REVIEWING AND REVERSING THAT ORDER LIKE ANY OTHER FINAL ORDER IN AN ENFORCEMENT PROCEEDING.

The heart of petitioners' case is that, despite affirmance of the subpoena enforcement order, and despite the fact that the Commission was seeking only a coercive decree, the Commission had no right to insist upon the district court's compelling obedience to its enforcement order. Petitioners insist that since it was the court's order, not the Commission's, out of which the contempt arose, the court had an absolute and non-reviewable discretion to determine whether to grant coercive or punitive relief as well as to determine the extent of the punitive relief granted (Br. 14–15). Subsidiary to this contention, it is urged that although the Commission instituted civil contempt proceedings and insisted at all times that it was seeking only a coercive decree, the district court by the device of imposing a punitive, unconditional fine, accepted and paid by petitioners, could (1) exhaust its jurisdiction to grant coercive relief, and (2) convert the proceedings into an exclusively criminal contempt proceeding, and

thereby disable the Commission as an agency of the Government from appealing from the judgment.

It would appear that the district court accepted petitioners' contention as to its absolute discretion to withhold a coercive decree. Since there was no showing of present inability of petitioners to comply with the subpoena enforcement order, the district court's discretion appears to rest at most upon information gained while presiding at a criminal trial in which, it is stated, some, although not all, of the documents sought by the Commission's subpoena were produced (Br. 6). Apparently the district court believed that the Commission should discontinue its investigation in view of the unsuccessful prosecution. The issue thus presented is thus but another phase of the problem of the duty of the courts to aid the administrative agencies in the discharge of their law enforcement responsibilities and, with particular reference to subpoena enforcement proceedings, to grant coercive relief without attempting to forecast the results of the administrative inquiry or otherwise to invade the area of administrative discretion. See *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186; *Endicott Johnson Corporation* v. *Perkins*, 317 U. S. 501; *United States* v. *Morgan*, 307 U. S. 183.

1. The investigative powers given to the Commission under the Act (Sections 19 to 22, 15 U. S. C. 77s-v), particularly the provision giving the Commission the right to compel testimony over claim

of privilege (Section 22 (c)), show a legislative intent that the courts should render all proper assistance in enabling the Commission to uncover the facts, and that its investigations should not be permitted to be delayed or forestalled by the contumacy of persons who have been subpoenaed to produce evidence. Section 22 (b) provides the machinery for enforcing subpoenas issued by the Commission in the course of its investigation. Two steps are outlined, both requiring the aid of the courts. The first, an application by the Commission for an order to enforce a subpoena which has been disobeyed, has been completed. However, the subpoena enforcement order thus obtained by the Commission and affirmed on appeal has not been successful in securing compliance with the subpoena. The continued disobedience by petitioners of the order necessitated following the second step prescribed by the statute. Section 22 (b) provides:

> * * * any failure to obey such [subpoena enforcement] order of the court may be punished by said court as a contempt thereof.

Pursuant to this provision, the Commission applied to the court for a contempt order.

The Commission, as an agency designated by the Congress to enforce the Act, was entitled to the support of the district court in its effort to ascertain the facts. Without such support, the Commission's administrative process was blocked at the threshold of its inquiry. Unless the Commission's investigation is brought to fruition, the

statute necessarily fails of its purpose (see R. 64). As this Court said in *United States* v. *Morgan*, 307 U. S. 183, 191:

> Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action.

And see *United States* v. *Ruzicka*, No. 54, this Term, decided December 16, 1946, slip opinion, pp. 8–9.

In the light of this admonition, the district court, by refusing a coercive decree, was derelict in its obligation under the Act. As the court below held (R. 96–97), the district court's "refusal to commit until the order is obeyed, frustrates the remedial purpose of the legislation creating the right to secure access to the documents." The fine of $50, in the face of the court's obligation, was a meaningless and empty gesture. It was as irrelevant to the Commission's purpose of coercing production of the company's records as a mere reprimand; indeed, it served principally as a formal means of terminating the proceeding and amounted in effect to a rescission of the prior enforcement order notwithstanding affirmance on appeal.

Furthermore, even assuming arguendo that there was room for discretion in that regard, it is clear that the reason given by the court for

refusing a coercive order was clearly invalid. The colloquy between the court and counsel for the Commission (R. 86–87) indicates that the court's refusal to impose a remedial penalty was based upon its opinion that in the criminal trial of Penfield, Young and others:[6]

> the evidence was clear and definite and positive from all of the Government's witnesses, that during one period of time this defendant [Young] had nothing whatsoever to do with the Penfield Company. Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know.

The continuity or extent of Young's association with Penfield and its effect on any possible future prosecution or administrative proceeding furnished no justification for refusing to render a coercive decree calculated to obtain compliance with the district court's order of June 1, 1943;[7] Young, as an officer of Penfield, was subpoenaed to produce Penfield's books and records, not his own. See *Wilson* v. *United States*, 221 U. S. 361. The district court's

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[6] See note 3, *supra*.

[7] Moreover, collateral attack on the subpoena enforcement order is not permissible. *Oriel* v. *Russell*, 278 U. S. 358; *United States* v. *Seidmon*, 154 F. 2d 228, 231 (C. C. A. 7); *Clarke* v. *Federal Trade Commission*, 128 F. 2d 542 (C. C. A. 9); *E. Ingraham Co.* v. *Germanow*, 4 F. 2d 1002, 1003 (C. C. A. 2). We have some difficulty, in any case, in understanding how the court could know in advance of the examination of the records in question, what, if anything, they would show.

order directed that the corporate books be produced for the Commisison's inspection. Young's guilt or innocence with respect to any new violation uncovered in an examination of the books has no bearing on the only issues which were before the court, viz., whether Young was able to produce, but had nevertheless refused to comply with the mandate. *Oriel* v. *Russell*, 278 U. S. 358. The district court by finding Young in contempt indicated that in its judgment he was able but unwilling, however, to produce the books (R. 85, 86). Hence, as we have shown, the district court failed to discharge its duty under the Act to grant a coercive decree.

Moreover, the record clearly shows that even though the order of June 1, 1943, had been confirmed on appeal and hence was final in every respect, the district court had made up its mind not to coerce Young into future compliance therewith. This is made plain not only by the character of its order (R. 87), but also by concurrent statements from the bench (R. 86):

> The Court: * * * The order will stand that the defendant be adjudged guilty of contempt.
>
> Do you have anything to say in connection with the disposition of this matter, Mr. Cuthbertson?
>
> Mr. CUTHBERTSON [Commission counsel]: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court,

if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refused to produce his books and records for our inspection.

The Court: I don't think that I am going to be disposed to do anything like that.

These remarks by the court, and others as well (R. 46, 68, 72, 73, 86), considered in the light of the nominal fine imposed by the court and the prior refusals to grant a prompt hearing on the contempt charges, reveal a fixed attitude of the court which would have rendered futile any attempt by the Commission again to demand production of the records and again to request a coercive decree for contempt. Moreover, such an attempt could be anticipated to produce still further delays. It would seem evident that the court took it upon itself to determine whether it was desirable as an administrative matter for the Commission to examine the records and that it resolved not to require the books to be produced because of its views as to the effect on the investigation of the disposition of the aforesaid criminal case.[8]

[8] The district court's mistaken view that it had a wide discretion with respect to enforcement of the Commission's investigatory powers is also indicated by its several rulings postponing the contempt proceedings (R. 80–81). These postponements were granted merely because of the pendency of a criminal proceeding involving *some* of the persons under investigation by the Commission (R. 76), and despite the fact that the Commission's investigation could lead to other criminal prosecutions against the same or other persons, civil

The right of administrative agencies to subpoena enforcement orders[9] would indeed be empty if those subject to such orders could delay compliance pending meritless appeals from an enforcement order, and thereafter persist in flouting a court order affirmed on appeal. Imposition of a nominal and patently ineffectual fine for contempt of an order affirmed on appeal is an even more serious threat to effective enforcement of the securities laws than failure to enter a required enforcement order in the first place. The need for effective enforcement amply justified the court below in affirming the clear duty of the district court to compel respect for its own enforcement order, and in concluding that this

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injunctive proceedings, or even administrative proceedings against persons subject thereto (R. 45, 47–48), such as broker-dealers registered under the Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. 78). In so doing, the court incorrectly took the position that it had discretion to postpone hearing the application for a contempt order at that time merely because the production of corporate records which the contempt proceedings sought to coerce would be usable in the pending criminal case (R. 73). The fact that the corporate records might be so used against Young afforded him no basis for refusing to produce the Penfield records in compliance with the district court's order. *Sinclair* v. *United States*, 279 U. S. 263; *Wilson* v. *United States*, 221 U. S. 361; *In re Verser-Clay Co.*, 98 F. 2d 859 (C. C. A. 10), certiorari denied, 306 U. S. 639.

[9] *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186; *Endicott Johnson Corporation* v. *Perkins*, 317 U. S. 501; and see *Penfield Co. of California* v. *Securities and Exchange Commission*, 143 F. 2d 746 (C. C. A. 9), certiorari denied, 323 U. S. 768.

could be accomplished only by a coercive contempt order. If persistent disobedience of a court order enforcing a subpoena issued by the Commission is susceptible of being brushed aside with nothing more than a $50 fine, with no promise of further action by the court to enforce its decree, the Commission's investigatory powers under the Act would surely be "frittered away in constant delays and failures of enforcement of lawful orders." *Oriel* v. *Russell*, 278 U. S. 358, 363.

2. It is elementary that obtaining obedience to the court's order, so long as compliance remains possible, is one of the most fundamental purposes of contempt proceedings, not only to vindicate the authority of the judiciary generally but to assure the civil litigant the relief to which he may be entitled in the particular case. As stated in *Bessette* v. *W. B. Conkey Company*, 194 U. S. 324, 327:

> The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded.

The Court quoted in that case with approval from Judge Sanborn's opinion in *In re Nevitt*, 117 Fed. 448, 459 (C. C. A. 8):

> * * * But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before

> it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings.

And see *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450.

The court below held that the proceeding was one for civil contempt (R. 96), and petitioners apparently do not question the fact that all action taken by the Commission was directed towards treating the case as a civil contempt proceeding and as a civil contempt proceeding exclusively.[10] Thus, the case was captioned as a civil action (R. 2, 11, 25), entitled in and filed as a continuation of the original civil action in the district court to enforce the Commission's subpoena (see R. 2, 25, 77–78), was called on the civil calendar (R. 77), and was repeatedly stated by Commission counsel to be a proceeding for civil contempt to obtain compliance with the subpoena enforcement order (R. 35–39, 43, 45, 48, 58–59, 77, 86). Petitioners' counsel recognized the civil nature of the proceeding by citing the Rules of Civil Procedure to support one of his contentions at the February 8, 1945, hearing in the district

[10] The fact that the Commission is an agency of the United States Government does not, of course, preclude it from instituting civil contempt proceedings or otherwise obtaining civil relief in the courts of the United States. *McCrone* v. *United States*, 307 U. S. 61.

(R. 27). The district court also referred to the Rules of Civil Procedure (R. 42, 73). Commission counsel repeatedly urged that coercive relief, and coercive relief only, be granted, and continued to do so in the face of contentions by petitioners' counsel that the proceeding should be treated as a criminal proceeding and the intimation that the court contemplated a punitive judgment in the event that contempt should be established (R. 31–32, 34, 68, 85–86).

Of course, the Commission recognizes that a contempt proceeding can be both criminal and civil in character. See *Union Tool Company* v. *Wilson*, 259 U. S. 107. And, of course, the court may institute criminal contempt proceedings of its own motion. Apart from the question of whether the court took proper steps to warrant a criminal contempt punishment in this case, an issue which may have been foreclosed by petitioners' payment of the fine and failure to appeal therefrom, it is submitted that the imposition of a nominal punitive sanction cannot be used to defeat a civil litigant's right to a remedial decree. While the circumstance that a coercive decree appears impracticable may be a factor in determining whether to institute criminal proceedings or to impose a purely punitive decree, it is clear that the imposition of a punitive decree does not relieve the contemnor from further compliance with an outstanding injunctive order. In this case petitioners made no effort to purge their contempt and continued to dispute the

authority of the outstanding order. Denial of a coercive decree in the circumstances of this case was nothing less than a denial of any effect to the Commission's right to enforcement of its subpoena which had been conclusively adjudicated in the prior litigation.

When, as in this case, the contemnor is still resisting compliance with a subpoena enforcement order and the contempt is thus a continuing one, the imposition of a coercive sanction—whether a fine or imprisonment, conditioned upon further continuance in contempt—is entirely unrelated to the question of what, if any, punishment the court may impose for the past contempt of its order. As this Court stated in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 442:

> * * * Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. * * * If imprisoned, as aptly said in *In re Nevitt*, 117 Fed. Rep. 451, "he carries the keys of his prison in his own pocket." He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

The contemnor with the keys to his prison in his own pocket will suffer punishment only for continuing in contempt.

It was the failure of the district court to deal with this continuing contempt which, the court below held, frustrated the remedial purposes of the Securities Act. Petitioners likewise ignore this continuing contempt in claiming that Section 268 of the Judicial Code, *infra*, p. 38, limits a court to imposing a fine or imprisonment for the single contempt (Br. 14). Assuming the applicability of Section 268 to civil contempts,[11] its provisions do not make the order of the district court imposing the fine such a matter of discretion as not to be subject to review. See *Worden* v. *Searls*, 121 U. S. 14, 26; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 450–1. This limitation, moreover, does not apply where one type of punishment is imposed for past action constituting a criminal contempt and the other as a civil sanction to coerce compliance in the future. See *Kreplik* v. *Couch Patents Co.*, 190 Fed. 565 (C. C. A. 1).

If, moreover, as petitioners contend, the court by imposing an unconditional fine disabled itself to impose conditional imprisonment as a means

[11] As the court below noted, *In re Bradley*, 318 U. S. 50, relied on by petitioner, was a case of criminal contempt exclusively, not one where there had "been denied to the opposing litigant a civil remedy to which he was entitled" R. 97. The fine there imposed was an appropriate punishment for the criminal contempt, whereas here the fine was not appropriate in dealing with the civil contempt of petitioner Young. The *Bradley* case holds, of course, that Section 268 of the Judicial Code applies to a criminal contempt. It is not so clear, however, whether this section applies to civil contempts. The language of the

of coercing compliance with the outstanding subpoena enforcement order, then clearly the imposition of the nominal fine was in itself erroneous and could properly be set aside by the judgment of the court below.[12] By such a reversal peti-

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section furnishes no clue. However, in *Lamb* v. *Cramer*, 285 U. S. 217, a contempt was held civil, although not within any of the classes of contempts embraced in Section 268. Further, the legislative history of the section indicates that its purpose was to restrict the power of federal judges to punish for criminal contempt. Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts*, 37 Harv. L. Rev. 1010, 1024–1029; Nelles and King, *Contempt by Publication in the United States*, 28 Col. L. Rev. 401, 525; cf. *Michaelson* v. *United States*, 266 U. S. 42, 66, indicating that statutory limitations on the inherent power of the courts to punish for contempt may not be sustained if applicable where the contempt sought to be dealt with is a continued disobedience to the court's order. See also the argument of Mr. John W. Davis of the House Committee on the Judiciary in support of the bill that became Sections 21-25 of the Clayton Act, quoted in Frankfurter and Landis, *supra*, 37 Harv. L. Rev. at 1057. There is some authority that Section 268 does apply to civil contempts. Thus, conduct not within any of the classes of contempts specified in the section was held (one judge dissenting) to provide no basis for a civil contempt judgment. *In re Sixth and Wisconsin Tower, Inc.*, 108 F. 2d 538 (C. C. A. 7).

[12] Petitioners pressed in the court below both in their original brief and their petition for rehearing their point that the combination of a punitive fine and any coercive remedy (whether or not involving conditional imprisonment) would be beyond the jurisdiction of the district court. After the petition for rehearing the court corrected its opinion so as to make clear that the order imposing the fine was reversed in its entirety (R. 99). The correction added the words "and instead to impose the fine" in the last sentence of the third paragraph of the court's opinion (R. 96), and also changed the first words of the last paragraph of the opinion which

tioners became entitled to the return of the fine. See *United States* v. *Morgan*, 307 U. S. 183; *Cramer* v. *Phoenix Mutual Life Insurance Co. of Hartford, Conn.*, 91 F. 2d 141 (C. C. A. 8), certiorari denied, 302 U. S. 739.

3. Since the contempt order fining Young and refusing the Commission a coercive decree was issued upon a judgment for civil contempt for disobeying a subpoena enforcement order, and the latter order was a final one,[12] the contempt order was appealable by the Commission to the circuit court of appeals. *Lamb* v. *Cramer*, 285 U. S. 217, 220; *Clarke* v. *Federal Trade Commission*, 128 F. 2d 542, 543 (C. C. A. 9); *Enoch Morgan's Sons Co.* v. *Gibson*, 122 Fed. 420 (C. C. A. 8); *L. E. Waterman Co.* v. *Standard Drug Co.*, 202 Fed. 167 (C. C. A. 6); *State Grand Lodge of Pennsylvania* v. *Morrison*, 277 Pa. 41, 120 Atl. 769; see *Union Tool Co.* v. *Wilson*, 259 U. S. 107; see also the Securities Act, Section 22 (a), 15 U. S. C. 77v (a).

Petitioners apparently do not challenge the right of a civil litigant including a governmental agency to appeal from an adverse judgment in a proceeding for civil contempt.[13] Here again their argument

originally began "The order is reversed * * *" so that it now reads "The order imposing the fine is reversed * * *" (R. 98).

[12] *Penfield Co. of California* v. *Securities and Exchange Commission*, 143 F. 2d 746 (C. C. A. 9), certiorari denied, 323 U. S. 768.

[13] As a civil contempt proceeding, no application for allowance of the Commission's appeal from the order fining Young was necessary, as petitioners contend (Br. 11). The

substantially ignores the civil character of the proceedings and assumes that what would otherwise be in all respects a civil proceeding was transformed into a criminal proceeding by the imposition of a nominal, unconditional fine not sought by the Commission (see Pet. Br. 13, 19). If, of course, the imposition of the $50 unconditional fine could work such a metamorphosis, then the petitioners would indeed be in a position to argue that the Commission

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filing of a notice of appeal was sufficient. Rule 73, Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c, which superseded Section 132 of the Judicial Code (28 U. S. C. 228), relating to allowance of appeals. See also *Nye* v. *United States*, 313 U. S. 33. Petitioners assert that an application for allowance of an appeal is required by Section 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 940 (28 U. S. C. 230). This provision, however, merely fixes the *time* within which an application for an appeal must be made, in the cases where such application is necessary. See note by Advisory Committee under Rule 73 of the Federal Rules of Civil Procedure. The cases cited by petitioners, with the exception of *Nye* v. *United States*, 313 U. S. 33, which supports our view, either were decided before the effective date of the Federal Rules of Civil Procedure, or are irrelevant, or involve an appeal by the defendant in a criminal case. Of course, if the instant proceeding were solely for criminal contempt, the Commission would have no right to appeal from the punishment order, whether by notice of appeal or by petition for allowance of an appeal. See *United States* v. *Sanges*, 144 U. S. 310. Finally, there is no merit in petitioners' contention that it was necessary for the Commission, in order to appeal, to take an exception to the order fining Young (Br. 12). Commission counsel made known to the court that the Commission desired a coercive decree (R. 86). That was sufficient. Rule 46 of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. See *United States* v. *National Biscuit Co.*, 25 F. Supp. 329 (S. D. N. Y.).

as a governmental agency could not appeal from any error or inadequacy in the unconditional punishment so imposed. But the argument is only an assertion in different terms of the basic contention that the district court, although lacking an unfettered discretion to deny the Commission a subpoena enforcement order itself, did have an unlimited discretion to deny coercive sanction to its enforcement order once granted. The statement of this argument carries its own answer.

We recognize, of course, that where both civil and criminal elements are involved in the contempt order, the criminal aspect of the order has been held to be "dominant" and fixes its character for purposes of appellate review. *Nye* v. *United States*, 313 U. S. 33, 42; *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 110; *In re Merchants' Stock & Grain Co.*, 223 U. S. 639, 642; *Matter of Christensen Engineering Company*, 194 U. S. 458; see *Nye* v. *United States*, 313 U. S. 33. These cases do not hold, however, that the inclusion of criminal elements in an otherwise appropriate civil contempt proceeding may negative the right to review of so much of the judgment as relates to the civil contempt, particularly where the civil litigant, denied the relief to which he is clearly entitled, is in no way responsible for the inclusion in the proceeding of issues with respect to criminal punishment. Indeed, the primary significance of these cases is to enlarge, not limit rights of review. Thus the contemnor,

who is a party to the main proceeding, may appeal from a criminal contempt punishment even though the punishment is for disobedience of an unappealable interlocutory decree where an exclusively coercive decree for civil contempt would not be appealable. Where, however, contempt of an interlocutory decree results in both criminal punishment and a coercive decree in respect of the civil contempt, the taking of an appeal by the contemnor permits a cross-appeal by the moving party complaining of the inadequacy of the civil relief. *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 110. Thus, in the instant case, if the subpoena enforcement order were not a final one, Young but not the Commission could have appealed from the punitive fine. Since the enforcement order was a final one, the Commission, as we have shown, was entitled to appeal from the erroneous order imposing only a nominal punitive fine in a civil contempt proceeding.

4. Since the order of June 1, 1943, required performance of an affirmative act, namely, the production of Penfield's books and records, an appropriate means for securing compliance is imprisonment unless and until the order is compiled with. *McCrone* v. *United States*, 307 U. S. 61; *Oriel* v. *Russell*, 278 U. S. 358; *In re Delgado*, 140 U. S. 586; *Clarke* v. *Federal Trade Commission*, 128 F. 2d 542 (C. C. A. 9); *In re Nevitt*, 117 Fed. 448 (C. C. A. 8); *Fenton* v. *Walling*, 139 F. 2d 608 (C. C. A. 9), certiorari denied, 321

U. S. 798; see *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 442.

The court below, after reversing the district court order which imposed a punitive fine on Young, remanded the case to the district court "for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question" (R. 98). We are aware that the contempt statute (28 U. S. C. 385, Appendix, *infra*, p. 38), gives a court discretion whether to impose a fine or imprisonment and that this Court has approved the imposition by a district court of a conditional, coercive fine to compel performance of an affirmative act, committing the contemnor until the fine is paid or the act performed. See *Fox* v. *Capital Company*, 299 U. S. 105; *Doyle* v. *London Guarantee and Accident Company, Limited*, 204 U. S. 599. However, in our opinion, the circuit court of appeals, in the exercise of its supervisory jurisdiction over the district court, was justified in directing the district court to enter an order of conditional imprisonment. This direction could fairly be regarded by the court below, in the circumstances of this case, as the only feasible means of coercing Young to produce Penfield's records, in view of the long continued and unmitigated refusal to comply with the outstanding subpoena enforcement order, the wholly inadequate assistance given by the district court to the Commission's enforcement efforts, and the clear indication that the district court did not intend to coerce further compliance with the

order notwithstanding affirmance on appeal. Compare *Union Tool Co.* v. *Wilson*, 259 U. S. 107. If a conditional fine were imposed and paid to avoid production of these records, the proceeding would of course not terminate; the Commission would be obliged to institute a second contempt proceeding. The net result would be further delay in the Commission's investigation, with the injuries to the public interest and to investors which such delays involve. Indeed, imposition of even a heavy fine could be regarded by the court below as unlikely to coerce production in this kind of a case. The record discloses that petitioners were prepared to go to almost any length to prevent these corporation records from being subjected to scrutiny by the Commission. The inference is justifiable that they felt such scrutiny to be fraught with grave danger of discovery of willful violations of the provisions of the federal securities laws. That kind of danger would more than overcome any reluctance to pay a fine. Moreover, every additional delay obtained by noncompliance would make their chances of escaping justice that much more likely. As stated in *Cobbledick* v. *United States*, 309 U. S. 323, 325, "To be effective, judicial administration must not be leaden-footed."

In the light of the history of the case, the court below adopted, we submit, the only practical course to coerce production of the records. Petitioner Young need only obey the lawful order to produce

the corporate records, in order to escape the conditional imprisonment imposed by the court below.

II

IN VIEW OF PETITIONERS' FAILURE TO APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT HOLDING YOUNG IN CONTEMPT, THE SUFFICIENCY OF THE NOTICE TO PETITIONERS OF THE NEW DATE FOR PRODUCTION IS NOT SUBJECT TO REVIEW; IN ANY EVENT, PETITIONERS HAD SUFFICIENT NOTICE

Petitioners attack the judgment of contempt on the ground that, after the circuit court's mandate affirming the subpoena enforcement order was filed, Young was not given proper notice fixing a new date for the inspection of Penfield's records (Pet. Br. 16). But this objection constitutes an attack upon the district court's judgment of contempt from which petitioners did not appeal. This issue was litigated in the district court and was decided adversely to the petitioners. Since petitioners did not appeal, they were not permitted to urge, in opposition to the appeal by the Commission, objections to the judgment of contempt which were considered and determined against them in the decision of the district court (R. 96). *Le Tulle* v. *Scofield*, 308 U. S. 415; *Helvering* v. *Pfeiffer*, 302 U. S. 247; *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191. The cases cited by petitioners (Br. 18) do not hold otherwise. Moreover, petitioners urge that the judgment of the district court should be affirmed (Br. 20).

Petitioners' failure to challenge the imposition of an unconditional fine makes irrelevant the question of whether the past non-compliance which was the basis for the punitive judgment was sufficiently willful to warrant a penal sanction. In relation to the Commission's effort to obtain a coercive sanction that issue could only be relevant for its bearing upon the necessity for the Commission to seek a contempt judgment to implement the prior enforcement order. That necessity is in turn conclusively established by the position which the petitioners have consistently taken after their appearance in the contempt proceedings; namely, an insistence that they are not required to comply with the enforcement order.

In any event, the record shows that petitioners were fully apprised, both directly and through counsel, that the court's order directing them to produce was again operative following their unsuccessful appeal therefrom, and that the Commission wished to examine the records on a designated date. The letter of notification, which was mailed on January 16, 1945 (R. 6, 9–10; see R. 80), advised them of the filing in the district court of the mandate of the circuit court of appeals. Enclosed in the letter was a copy of the subpoena enforcement order (R. 6, 9, 10–15). The request in the letter conformed to the provisions of that order that the records "shall be made available to such officer and employees of Securities and Exchange Commission as may

be designated, at the office of Respondent [Penfield] * * *" (R. 14). If a demand were necessary,[15] it seems clear that this letter and the enclosure met that requirement. The Federal Rules of Civil Procedure permit service of notices upon the attorney representing the party and such service may be made by mail. Rule 5 (b). See *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302 (C. C. A. 2); *Tilghman* v. *Tilghman*, 57 F. Supp. 417 (D. D. C.). The court having acquired jurisdiction over the person of petitioner Young, no further process was required. *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 454.

Petitioners, however, assert that Young and his present counsel were in fact out of town from a date prior to the mailing of the letter of January 16, 1945, until after the Commission's officers called at the office of Penfield to see the books (Br. 16–17). However, they apparently were in town when the mandate was issued and filed and could have made the necessary arangements to comply (See R. 80). Moreover, the record indicates that the letter was mailed to Young at two addresses, to the office of his present counsel, and to two other attorneys for petitioners (R. 6, 9–10, 15–16), and that it did come

[15] It is arguable that no formal demand was necessary, and that petitioners were under a positive duty to comply with the mandate (see R. 80), which was issued more than two months before the request was made, and filed in the district court over a month before (R. 5).

to the attention of co-counsel for petitioners in the district court proceeding (R. 65). Young could have been reached in ample time. Consequently, the record justifies the finding of the district court that Young's absence from the city was an inadequate excuse (R. 84). Certainly this is correct in view of the fact that, after the contempt proceedings were commenced, there was no offer to comply, only continued resistance. In any case, disobedience of a court order need not be willful to sustain a judgment of civil contempt. *Telling* v. *Bellows-Claude Neon Co.*, 77 F. 2d 584, 586 (C. C. A. 6), certiorari denied, 296 U. S. 594; *National Labor Relations Board* v. *Whittier Mills Co.*, 123 F. 2d 725 (C. C. A. 5).

CONCLUSION

For the reasons stated, the judgment of the court below constituted sound exercise of its appellate authority and should be affirmed.

Respectfully submitted.

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APPENDIX

Securities Act of 1933 (48 Stat. 74, 15 U. S. C. 77a, *et seq.*):

SEC. 19. (b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

SEC. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

SEC. 22. (b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal

to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Judicial Code, section 268 (28 U. S. C. 385):

The courts of the United States shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

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IN THE

Supreme Court of the United States

October Term, 1946

No. 453.

PENFIELD COMPANY OF CALIFORNIA, and A. W. YOUNG,

Petitioners,

vs.

SECURITIES & EXCHANGE COMMISSION,

Respondent.

PETITION FOR REHEARING.

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PENFIELD COMPANY OF CALIFORNIA, and A. W. YOUNG,
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PETITION FOR REHEARING.

To the Honorable Chief Justice Vinson and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner most respectfully petitions for rehearing in the above entitled cause and as grounds of said rehearing sets forth as follows:

I.

The court erred in matters of law in its opinion and decision.

II.

The court decided the case in conflict with principles of law announced in other decisions.

III.

The court erred in matters of fact.

I.

The Court Erred in Matters of Law in Its Opinion and Decision.

Because of the great importance of this decision in the procedural law of contempt and because we respectfully submit that we believe the court has overlooked certain essential matters of law and fact, we respectfully petition for rehearing.

This court has said in substance and effect in its majority opinion as follows:

> "This was a case of civil contempt exclusively. The trial court never adjudicated this case as one of civil contempt. It erroneously treated the case as one of criminal contempt. Therefore, the trial court's judgment was void."

We put quotation marks around the language though it is not an actual quote.

To put it in the specific language of Justice Rutledge, concurring:

> "By every test applied in the Gompers case this proceeding was civil, not criminal in character. . . . Hence, under the rule of the Gompers case and others following it, it is clear that the district judge had no power in this case to impose the criminal penalty of a flat $50 fine and it is equally clear, on the record, that he exceeded his power in denying the Commission civil coercive relief altogether. . . .
>
> "The only difference is that in the Gompers case the contemnors had not entered upon the service of the *void* criminal sentence of imprisonment but appealed from it, while here Young paid the fine and did not appeal. . . . But compliance with a *void*

criminal penalty, *void* because imposed in a wholly civil proceeding, cannot make it valid," etc.

If the judgment imposing a fine of $50 was void because this was assertedly a civil proceeding, then the District Court has not acted at all in the civil proceeding but has treated the whole matter as a criminal contempt and has only acted in relation to such criminal contempt. The matter is then wide open for the District Court to consider the application for the making of an order pursuant to Section 22(b) of the Securities Act of 1933, which provides that the United States Courts, "*May* issue to such person an order requiring such person to appear before the commission . . . . and any failure to obey such order of the court *may* be *punished* by said court as a contempt thereof." (Italics ours.)

Congress has given certain discretionary right and not any mandatory right to the District Court of the United States to decide whether it will issue an order and provides that any failure to obey such order may be *punished* by said court (the District Court) as a contempt thereof. The statute has not set out the punishment which it permits. This is left in thin air and has now been supplied without Congressional action by this court if this opinion is to staud. Furthermore, this court in a footnote in the *Mine Workers* case said:

> "It could be well argued that the use of the word 'punished' in the petition and the rule to show cause was in itself adequate notice, for 'punishment' has been said to be the magic word indicating a proceeding in criminal, rather than civil, contempt."

No jurisdiction was given to the Circuit Court of Appeals in the Act for the Circuit Court to make an order of contempt or for, as a matter of fact, this court to do so. It has left the power under Section 22(b) exclusively in the jurisdiction of the District Court.

The *Mine Workers* decision is not in conflict with this position for the *Mine Workers* decision was a proceeding based upon an injunction granted by the District Court of the United States under its general contempt powers, and in that case the proceeding as charged was both civil and criminal contempt. Here the government urges that the proceeding was purely civil contempt.

In the *Mine Workers* case, also, the trial court made specific finding of both civil and criminal contempt. All that this court did was to uphold the District Court's judgment but to revise the amount of the fine already pronounced by the District Court. This court did not impose its own judgment.

In the case at bar, this court has held that the trial court did not exercise its jurisdiction to grant civil relief provided for by Section 22(b) but has gone further and has stated that the Circuit Court of Appeals in the absence of anything done by the District Court of Appeals relative to the civil contempt could nevertheless order the District Court to impose a specified type of contempt punishment—this without notice or hearing in the District Court on this new judgment.

We respectfully submit this was beyond the jurisdiction of the Circuit Court or this court and that all that the Circuit Court had power to do under any circum-

stance was to remand the case to the District Court for the District Court to exercise its discretionary power given to it under Section 22(b) of the Securities Act to fix "punishment." This court has said in the instant opinion that a $50 fine is punishment, but that sending a man to jail until he produces the records is not punishment even though he remains in jail from now on. If the word punishment is "ambiguous" as said in footnote 64 in the *Gompers* case, then it is for Congress to remove the ambiguity. This court has often said no man should be "punished" on an ambiguous statute.

Lanzetta v. New Jersey, 306 U. S. 451, 83 L. Ed. 888;

U. S. v. L. Cohen Grocery Co., 255 U. S. 81;

U. S. v. Reese, 92 U. S. 214, 24 L. Ed. 563.

Another error contained in the opinion of this court is the holding of this court that in view of the fact that the defendant, Young, did not appeal from the adverse judgment in the District Court "he is precluded from renewing the objection at this stage." We had always assumed that a void judgment was void at any stage of any proceeding, and subject to attach at any time or any place, directly or collaterally. Indeed, this has been the holding of this court in:

United States v. Shipp, 203 U. S. 563;

In re Sawyer, 124 U. S. 200;

Ex parte Fish, 113 U. S. 713;

Ex parte Rowland, 104 U. S. 604.

If the defendant were to elect to be imprisoned, he could seek out a writ of *habeas corpus* to test the validity of the contempt proceedings. This has always been the rule in all courts where any form of imprisonment is void. Such a judgment is a nullity.

The *Mine Workers* case recognizes this principle. There is quite a different situation in *Helvering v. Pfeiffer*, 302 U. S. 247, 250, cited in the opinion of the court. That was a tax case and did not involve the question of a *void* judgment but an error of judgment. The *Helvering v. Pfeiffer* case merely held that where error was asserted by an appellee, he cannot raise it without a cross-appeal. In the case of *LeTulle v. Scofield*, 308 U. S. 415, another tax matter was involved as to whether a tax free reorganization came under the Revenue Act of 1928. Again no void judgment was therein involved. These are quite different from a *void* judgment which may be attack at any time collaterally, or even at any stage of the proceeding by *habeas corpus* if imprisonment follows. In the event of a void judgment this court will issue a Writ of Prohibition.

Ex parte Peru, 317 U. S. 578;
Or Habeas Corpus;
Ex parte Rowland, 104 U. S. 604;
Ex parte Lang, 18 Wall. 165 [85 U. S. XXI. 875];
Ex parte Parks, 93 U. S. 22 [XXIII, 788];
Ex parte Siebold, 100 U. S. 339 [XXV, 717];
Ex parte Virginia, 100 U. S. 339 [XXV, 676].

Furthermore, if the court's opinion is correct that the case requires a civil sanction not yet pronounced by the District Court (but ordered by the Circuit Court), we had no opportunity to appeal from such a coercive sanctionment of imprisonment, as the trial court had never made such pronouncement. The first occasion when such a pronouncement was made was in the Circuit Court of Appeal and thereafter, after the Circuit Court made such pronouncement, said petitioner petitioned this court for writ of certiorari to review such Circuit Court pronouncement.

QUERY:

If a trial court pronounces no judgment of a civil nature, what could the petitioner appeal from in the District Court over which he was dissatisfied?

Must he then file a cross-appeal in every contempt case which scrambles criminal and civil contempt to preserve his rights lest the Circuit Court of Appeals might reverse the judgment of the District Court or even pronounce, as they did in this case, that which they ordered the District Court to pronounce?

Hence, we respectfully submit the petitioner in this case has been denied his day in court under the command for coercive sanctions made for the first time by the Circuit Court of Appeals.

II.

The Court Decided the Case in Conflict With Principles of Law Annou[illegible]ed in Other Decisions.

This court has said:

> "When the court imposes a fine as a penalty, it is punishing yesterday's contemptuous conduct. When it adds the coercive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct. At least in that situation the offenses are not the same."

Under the state of the case, there was no notice on the part of the Government in the moving papers in the District Court of a prayer for a coercive sanction of imprisonment nor was there any hearing on this issue in the District Court, nor was there any opportunity to appeal from such a District Court order. Thus, it follows that without notice or hearing, the first essential of Due Process of Law guaranteed by the Fifth Amendment to the Constitution of the United States is violated (see *Powell v. Alabama*, 287 U. S. 45). A judgment of coercive sanction is now to be put into effect although the District Court never had a hearing thereon. This court and the Circuit Court therefore take on powers not granted by Section 22b which says, "and any failure to obey such order of the court may be *punished* by *said court* as a contempt thereof." Congress has not vested those powers in either the Circuit Court of the Supreme Court.

The judgment of this court erred in another legal respect. The moving papers on the part of the Securities & Exchange Commission in this case did not pray for any civil sanctions.[1]

It is true that the complaint was labeled a civil action by the Clerk of the Court. All actions are labeled civil actions which are strictly speaking not in the nature of an indictment or information, except that under the new rules of the court, adopted pursuant to a specific act of Congress, criminal contempt would bear a criminal label. But, it is not the label which the action has that determines its character.

> "It is not the fact of punishment but rather its character and purpose."
>
> *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 441.

The moving papers, in this case—the predicate on which it was necessary to base it, did not contain a prayer asking that the punishment in this case be a coercive sanction. As said in the *Gompers* case:

> "This is not a mere matter of form for manifestly every citizen, however unlearned in the law, by mere inspection of papers in contempt proceeding, ought to be able to see," etc.
>
> "He should not be left in doubt as to whether the relief or punishment was in view."

---

[1] The affidavit filed merely recited: "Affidavit in support of rule to show cause why A. W. Young, secretary-treasurer, Penfield Company of California, should not be adjudged in contempt." [R. 2.]

No prayer was contained in any of the moving papers of the Securities and Exchange Commission, nor was it indicated in any order of the court. In fact, it was not even pressed by Mr. Cuthbertson [R. 86] after the proceedings were all over.

The court erred in another respect in holding as follows:

> "It is argued that since no application for an allowance of appeal was made, the Circuit Court of Appeals had no jurisdiction to entertain it. If the appeal was in a suit of a civil nature, the filing of the notice of appeal with the District Court was adequate under the Rules of Civil Procedure."

However, contempt proceedings are not either civil proceedings or criminal proceeding. This was recognized by the Congress when, in order to amend the Criminal Rules of Procedure relative to criminal contempt, it was deemed necessary for Congress to pass a Special Statute permitting the Supreme Court to extend its powers to provide punishment for *criminal* contempt of court by a new rule. The Act of November 21, 1941 (55 Stat. 779) gave this authority.

However, special authority of Congress was deemed necessary before such a rule could be adopted regarding criminal contempt. Certainly the absence of any Congressional authority relative to civil contempt leaves a *"casus omissus"* in relation to civil contempt which just leaves the matter controlled entirely by Title 28, Section 230. This court has now put into effect a rule for civil contempt which Congress did not authorize and has reversed itself from the position taken in *U. S. v. White*, 322 U. S. 694.

We believe that this court has overlooked the fact that the power was not deemed to exist relative to criminal contempt proceedings without special authority of the Congress.

The court has also overlooked the fact that for whatever punishment of contempt the trial court imposed was a contempt of *his own order* and not of the order of the Securities & Exchange Commission. The entire matter is treated by the court as though the contempt proceeding was because of disobeying an order of the Securities & Exchange Commission. This is incorrect. The alleged disobedience was of the court's order. This court has now said that one who does not comply with an *administrative* subpoena is guilty of contempt of *court*. For its reasoning is that the court abuses its discretion if it does not *compel* the obedience of the administrative subpoena. The court is thus made a rubber stamp for the administrative agency.

THE COURT ERRED IN MATTERS OF FACT.

The court also erred in respect the right and power of the Securities & Exchange Commission to issue an order putting into effect the order of the court.

The court has now by judicial construction changed Section 22(b) to read as follows:

> "And any failure to obey an *administrative* subpoena *duces tecum* will result in an order of the court commanding you to obey said subpoena, and you will be *punished* by said court as a contempt thereof."

Thus the language of Section 22(b) has been rewritten by the present opinion of the court to make it (1) an

abuse of discretion for the court to fail to compel obedience to the administrative order; (2) an abuse of discretion to fail to order the imprisonment of a person until he does obey the administrative order.

This may be in the power of Congress to command, but Congress did not do so and we respectfully submit that the court has no jurisdiction to do so.

The court also has now by its opinion held that a judgment pronounced June 1, 1943 by a court to be put into effect on June 8, 1943 and to become effective as of that date, which has long past, may be renewed by a *mere letter* of an administrative officer of the Securities & Exchange Commission in 1945, and that the alleged disobedience of the *letter* of the *administrative officer* becomes a *contempt* of the *court*.

If the District Court itself had sought to delegate its powers to the Securities and Exchange Commission to put into effect an order of the court, or to renew an order of the court fixing a new date and place to carry out the court's order, we do not believe there could be any question, but that this court would hold such a delegation of the court's function to the administrative body unconstitutional and void. But here, in the case at bar, the administrative officer, even without the action or participation of the court, merely wrote a letter attempting to reinvest force and power in the long spent order of the District Court by writing a letter to Young, stating that on a day only eight days away the writer of the letter will call upon Young to see certain books and records.

This letter certainly was without power or force, yet the court imposed punishment because the writer of the

letter, having gone to some address and having seen some unknown person, not the petitioner, did not see the books and records on that day. We believe this did not constitute notice of anything at all, nor contempt, nor "persistent refusal" and that the attempt by the Securities & Exchange Commission officer to revitalize the order of June 1, 1943 was a nullity and, therefore, subject to direct or collateral attack.

The Opinion of the Supreme Court Is in Conflict With Other Decisions of This Court.

This court, in the *Mine Workers'* case, said in its majority opinion:

> ". . . the trial judge may properly take into consideration the extent of the wilful and deliberate defiance of the court's order, the seriousness of the consequences, etc. . . ."
>
> "Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge."

In the present case the majority of this court placed *no reliance* upon the discretion of the trial judge.

There was filed with this court a clerk's memorandum containing a record of exhibits that were filed at the trial court which we ask this court to examine. This memorandum consisted of 25 pages of merely listing the exhibits that were filed at the criminal trial. They included countless documents and papers that stacked the courtroom and filled a safety vault in the court. We said in our Opening Brief that "almost all" of the documents requested in the Subpoena Duces Tecum had been placed before the trial court and secured by the Government

prior to the criminal trial. After the close of the trial the Government withdrew all of its exhibits. Therefore, it was not possible for us to compare with certainty the list of exhibits which the Government had in its possession and those which we had been requested to produce in the subpoena *duces tecum*. We invited the Commission to submit those exhibits to this court but the Commission chose not to do so.

During the oral argument, Chief Justice Vinson stated to this counsel that if all of the exhibits had been produced, then there would be no contempt. We could not, with certainty, state that all had been produced as we had no means of comparison. We did say that nearly all exhibits had been produced and this was not denied by the Government's counsel, which made most of the words "nearly all" in its Opening Brief. Bearing in mind the fact that the court had the entire picture before it, which neither the Circuit Court nor this court had, we think that the decision in the Ming Workers' case is correct, that "Great reliance must be placed upon the discretion of the trial judge" and the majority opinion of this court is incorrect in stating that no reliance should be placed in this case upon the opinion of the trial judge. The trial judge's decision in the *Mine Workers'* case was in favor of the Government. This one was not agreeable to the Government, but discretion exists in favor of an accused as well as against him. The statute does not differentiate.

This Court Erred in Its Factual Statements.

This court stated: "The history of this case reveals a long persistent effort to defeat the investigation." We deny this. There were objections made to the Subpoena Duces Tecum as originally requested on the ground that the type of business of the Penfield Company, a whiskey business involving warehouse receipts for whiskey, did not come within the Securities Act of 1933 and that the Subpoena Duces Tecum was too broad and involved many things not within the scope of its investigation. When the order of the District Court was affirmed and certiorari denied, there never was, from that day to the present time, a lawful, valid process issued by the court or by the Securities & Exchange Commission requesting the books and records of Young at a specified time, place or date. After the determination of the original appeal, no new order fixing a new time, date or place was sought from the court. A simple letter was written by an investigator of the S. E. C., who was out of town, and to his client, who was out of town.[2] Thereafter nothing was ever done by way of notice, and in fact, no request was made by counsel for the Government for the books and records at any proceeding except that at the time that the court imposed the fine of $50.00, Mr. Cuthbertson said that he would still like to see the books and records, but nevertheless left the punishment up to the court.

In this very court room, during the argument, counsel stated that his client was willing to produce the books and

[2]This letter was given the force of an order of court in this case.

records that had not been secured already by the Securities & Exchange Commission. This offer was not met with stony silence from the counsel for the S. E. C.

We think the truth of the matter fairly stated is that the Securities & Exchange Commission and the United States Attorneys office already had all of the books and records that they were interested in, at the time of the criminal trial, for they had as their witness, the former president of the Pennfield Company of California, and officials of the Bourbon Sales Company of Kentucky, and they produced countless documents, letters, correspondence, whiskey warehouse receipts and permits—advertising literature, sales kits, original talks, and everything that could possibly be conceived as having a bearing on a S. E. C. case, either by way of a criminal prosecution or injunction, if valid grounds or basis therefore existed. Yet they chose to appeal this case at a later date.

We ask the court to examine the index of the District Court, listing of exhibits which were filed in the court below.

It will establish the correctness of the minority opinion in this case.

We respectfully pray for a rehearing to pass on the important procedural matters erroneously decided in the majority opinion and urge the adoption of the minority opinion. We also pray for a stay until the final determination of this petition for rehearing.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners.

Certificate of Counsel.

State of California, *County of Los Angeles*, ss.

I do hereby certify that in my judgment, the foregoing Petition for Rehearing is filed in good faith, and I do further certify that the said Petition is not interposed for the purpose of delay.

MORRIS LAVINE,
Counsel for Petitioners.

Frankfurter J. p. 3.

SUPREME COURT OF THE UNITED STATES

No. 453.—October Term, 1946.

The Penfield Company of California and A. W. Young, Petitioners, v. Securities and Exchange Commission.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 31, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

The Securities and Exchange Commission, acting pursuant to its authority under § 20 (a) of the Securities Act of 1933, 48 Stat. 74, 86, 15 U. S. C. § 77t, issued orders directing an investigation to determine whether Penfield Company had violated the Act in the sale of stock or other securities. In the course of that investigation it directed a subpoena *duces tecum* to Young, as an officer of Penfield, requiring him to produce certain books of the corporation covering a four year period ending in April, 1943. See § 19 (b) of the Act. Upon Young's refusal to appear and produce the books and records, the Commission filed an application with the District Court for an order enforcing the subpoena.[1] After a hearing, the court ordered

[1] Sec. 22 (b) provides:

"In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

Young, as an officer of Penfield, to produce them.[2] Young persisted in his non-compliance. The Commission then applied to the District Court for a rule to show cause why Young should not be adjudged in contempt—a proceeding which, as we shall see, was one for civil contempt. The District Court delayed action on the motion until after disposition of a criminal case involving Young, Penfield, and others. When that case was concluded, the court, after hearing, adjudged Young to be in contempt. It refused, however, to grant any coercive relief designed to force Young to produce the documents but instead imposed on him a flat, unconditional fine of $50.00 which he paid.[3]

[2] That order was affirmed by the Circuit Court of Appeals. 143 F. 2d 746.

[3] The request of the Commission and the ruling of the court are made clear by the following colloquy:

"MR. CUTHBERTSON: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refuses to produce his books and records for our inspection.

"THE COURT: I don't think that I am going to be disposed to do anything like that. I sat here for six weeks and listened to books and records. The Government produced people from all over the United States in connection with the Penfield matter.

"MR. CUTHBERTSON: I might say, your Honor, that we have in mind that these books and records may disclose certain acts other than those charged in the indictment. We don't propose to go over the same matter that the Court went over in connection with the criminal case.

"THE COURT: The Court can take judicial notice of its own books and records, and in that trial the evidence was clear and definite and positive from all of the Government's witnesses, that during one period of time this defendant had nothing whatsoever to do with the Penfield Company. Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know.

"The judgment and sentence of the Court is that the defendant pay a fine of $50, and stand committed until paid."

That was on July 2, 1945. On September 24, 1945, the Commission filed a notice of appeal in the District Court and subsequently a statement of points challenging as error the action of the District Court in imposing the $50.00 fine, instead of a remedial penalty calculated to make Young produce the documents. The Circuit Court of Appeals reversed, holding that the District Court erred in imposing the fine and directing that Young be ordered imprisoned until he produced the documents. 157 F. 2d 65. The case is here on a petition for a writ of certiorari filed by Penfield Co. and Young. Neither the District Court nor the Circuit Court of Appeals rendered judgment against Penfield. Nor is any relief sought by or against it here. Accordingly the writ is dismissed as to Penfield.

First. It is argued that since no application for an allowance of an appeal was made, the Circuit Court of Appeals had no jurisdiction to entertain it.[4] If the appeal was in a suit of a civil nature, the filing of the notice of appeal with the District Court was adequate under the Rules of Civil Procedure.[5]

It is the nature of the relief asked that is determinative of the nature of the proceeding. *Lamb* v. *Cramer*, 285 U. S. 217, 220. This was not a proceeding in which the United States was a party and in which it was seeking to

---

[4] Section 8 (c) of the Act of February 13, 1925, 43 Stat. 936, 940, as amended, 28 U. S. C. § 230, provides: "No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree." See *Alaska Packers Ass'n* v. *Pillsbury*, 301 U. S. 174; *Georgia Lumber Co.* v. *Compania*, 323 U. S. 334.

[5] Rule 73 (a) provides in part: "When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal." Where a Rule of Civil Procedure conflicts with a prior statute, the Rule prevails. 48 Stat. 1064, 28 U. S. C. § 723b.

vindicate the public interest. See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 445. The contempt proceedings were instituted as a part of the proceedings in which the Commission sought enforcement of a subpoena. The relief which the Commission sought was production of the documents; and the only sanction asked was a penalty designed to compel their production. Where a fine or imprisonment imposed on the contemnor is "intended to be remedial by coercing the defendant to do what he had refused to do", *Gompers* v. *Bucks Stove & Range Co.*, *supra*, p. 442, the remedy is one for civil contempt. *United States* v. *United Mine Workers*, 330 U. S. p. —. Then "the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." *McCrone* v. *United States*, 307 U. S. 61, 64. One who is fined, unless by a day certain he produces the books, has it in his power to avoid any penalty. And those who are imprisoned until they obey the order, "carry the keys of their prison in their own pockets." *In re Nevitt*, 117 Fed. 448, 461. Fine and imprisonment are then employed not to vindicate the public interest but as coercive sanctions to compel the contemnor to do what the law made it his duty to do. See *Doyle* v. *London Guarantee Co.*, 204 U. S. 599; *Oriel* v. *Russell*, 278 U. S. 358; *Fox* v. *Capital Co.*, 299 U. S. 105; *McCrone* v. *United States*, *supra*.

The Act gives the Commission authority to require the production of books and records in the course of its investigations. And in absence of a basis for saying that its demand exceeds lawful limits (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186), it is entitled to the aid of the court in obtaining them.* A refusal of the court to enforce its prior order for the production of the documents denies the Commission that statutory relief. The issue

* See § 22 (b), *supra*, note 1.

thus raised poses a problem in civil, not criminal, contempt.[7]

Where a judgment of contempt is embodied in a single order which contains an admixture of criminal and civil elements, the criminal aspect of the order fixes its character for purposes of procedure on review. *Union Tool Co. v. Wilson*, 259 U. S. 107. But there was no such admixture here. The District Court refused to grant any remedial relief to the Commission. The denial of that relief was the ground of the Commission's appeal. The order of denial being final, was appealable, *Lamb* v. *Cramer, supra*, pp. 220–221, and the right to appeal from it was in no way dependent on an appeal from the imposition of the fine.

Second. The question on the merits is two-fold: (1) whether the Circuit Court of Appeals erred in granting the Commission remedial relief by directing that Young be required to produce the documents; and (2) whether that court exceeded its authority in reversing the judgment which imposed the fine and in substituting a term of imprisonment conditioned on continuance of the contempt.

As we have already noted, the Act requires the production of documents demanded pursuant to lawful orders of the Commission and lends judicial aid to obtain them. There is no basis in the record before us for saying that the demand of the Commission exceeded lawful limits. There is, however, a suggestion that the District Court was warranted in denying remedial relief since the contempt hearing came after a criminal trial of petitioners in another case, during the course of which many of Penfield's books and records were examined. The thought apparently is that the Commission had probed enough into Penfield's affairs. But the District Court did not hold

[7] This thus disposes of the further contention that the appeal was not timely under the Criminal Appeals Act, 18 U. S. C. Supp. II § 682. *United States* v. *Hark*, 320 U. S. 531.

that the Commission's request had become moot, that the documents produced satisfied its legitimate needs, or that the additional ones sought were irrelevant to its statutory functions.[8] We agree with the Circuit Court of Appeals that at least in absence of such a finding, the refusal of the District Court to grant the full remedial relief which the Act places behind the orders of the Commission was an abuse of discretion. The records might well disclose other offenses against the Securities Act of 1933 which the Commission administers. The history of this case reveals a long, persistent effort to defeat the investigation. The fact that Young paid the fine and did not appeal indicates that the judgment of contempt may have been an easy victory for him. On the other hand, the dilatory tactics employed suggest that if justice was to be done, coercive sanctions were necessary.

When the Circuit Court of Appeals substituted imprisonment for the fine, it put a civil remedy in the place of a criminal punishment. For the imprisonment authorized would be suffered only if the documents were not produced or would continue only so long as Young was recalcitrant. On the other hand, the fine imposed by the District Court, unlike that involved in *Fox* v. *Capital Co.*, *supra*, pp. 106–107, was unconditional and not relief of a coercive nature such as the Commission sought. It was solely and exclusively punitive in character. Cf. *Nye* v. *United States*, 313 U. S. 33, 42–43.

As already noted, Young did not appeal from the order holding him in contempt and subjecting him to a fine. Young maintains, however, that once the fine was imposed and paid, the jurisdiction of the court was exhausted; that

[8] As will be seen from note 3, *supra*, the court, immediately prior to rendering its sentence, noted that there was one period during which Young was not connected with Penfield Co. But the court added: "Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know."

the Circuit Court of Appeals was without authority to substitute another penalty or to add to the one already imposed and satisfied. That argument rests on the statute granting federal courts the power to punish contempts of their authority, Judicial Code § 268, 28 U. S. C. § 385, and the decisions construing it. The statute gives the federal courts power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority," including violations of their lawful orders. At least in a criminal contempt proceeding both fine and imprisonment may not be imposed since the statute provides alternative penalties. *In re Bradley*, 318 U. S. 50. Hence if a fine is imposed on a contemnor and he pays it, the sentence may not thereafter be amended so as to provide for imprisonment. The argument here is that after a fine for criminal contempt is paid, imprisonment may not be added to, or substituted for the fine, as a coercive sanction in a civil contempt proceeding. If that position is sound, then the statutory limitation of "fine or imprisonment" would preclude a court from imposing a fine as a punitive measure and imprisonment as a remedial measure, or *vice versa*.

The dual function of contempt has long been recognized—(1) vindication of the public interest by punishment of contemptuous conduct; (2) coercion to compel the contemnor to do what the law requires of him. *Gompers* v. *Bucks Stove & Range Co.*, *supra*, pp. 441 *et seq.* *United States* v. *United Mine Workers*, *supra*, p. ——. As stated in *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 327, "The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded."

We assume, *arguendo*, that the statute allowing fine or imprisonment governs civil as well as criminal contempt proceedings. If the statute is so construed, we find in it no barrier to the imposition of both a fine as a punitive exaction and imprisonment as a coercive sanction, or *vice*

versa.[9] That practice has been approved. *Kreplik* v. *Couch Patents Co.*, 190 F. 565, 571. And see *Phillips S. & T. P. Co.* v. *Amalgamated Ass'n*, 208 F. 335, 340. When the court imposes a fine as a penalty, it is punishing yesterday's contemptuous conduct. When it adds the coercive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct. At least in that situation the offenses are not the same. And the most that the statute forbids is the imposition of both fine and imprisonment for the same offense.

Young raises objections that go to the merits of the judgment of contempt. These were considered and determined against him by the District Court. Since he did not appeal from that adverse judgment, he is precluded from renewing the objections at this stage. *Le Tulle* v. *Scofield*, 308 U. S. 415, 421–422; *Helvering* v. *Pfeiffer*, 302 U. S. 247, 250–251.

There is a difference of view among us whether the portion of the order of the Circuit Court of Appeals which set aside the unconditional fine of $50 imposed on Young is here for review. But if we assume that it is, a majority of the Court is of the opinion that the Circuit Court of Appeals was correct in setting it aside, since the fine was imposed in a civil contempt proceeding. See *Gompers* v. *Bucks Stove & Range Co.*, *supra*.

Affirmed.

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[9] Some rules governing criminal contempts are, of course, different from those governing civil contempts. *Gompers* v. *Bucks Stove & Range Co.*, *supra*, pp. 444, 446–449. If those differences are satisfied and if, as in *In re Swan*, 150 U. S. 637; *Matter of Christensen Engineering Co.*, 194 U. S. 458; *In re Merchants' Stock Co.*, 223 U. S. 639; *Farmers Nat'l Bk.* v. *Wilkinson*, 266 U. S. 503, the criminal penalty and the remedial relief are segregated, no problem of the adequacy of the order for purposes of appellate review is presented. No question is raised here as to the propriety of combining civil and criminal contempt in the same proceeding.

SUPREME COURT OF THE UNITED STATES

No. 453.—October Term, 1946.

The Penfield Company of California and A. W. Young, Petitioners, v. Securities and Exchange Commission.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 31, 1947.]

Mr. Justice Rutledge, concurring.

But for the decision in *United States* v. *United Mine Workers*, 330 U. S. —, I should have no difficulty in concluding with the Court that this contempt proceeding was exclusively civil in character and that, consequently, no criminal penalty could be imposed, coercive relief alone being allowable in such a case. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418.[1] That decision held that the imposition of criminal punishment in a civil contempt proceeding "was as fundamentally erroneous as if in an action of 'A *vs.* B. for assault and battery,' the judgment entered had been that the defendant be confined in prison for twelve months." 221 U. S. at 449.

By every test applied in the *Gompers* case this proceeding was civil, not criminal in character. Here as there the proceeding was entitled, instituted and conducted as collateral to civil litigation. It sought only remedial relief, namely, the production of specified books and records.[2]

[1] See *In re Fox*, 96 F. 2d 23; *Norstrom* v. *Wahl*, 41 F. 2d 910.

[2] The application in contempt was made by affidavit setting forth the facts alleged to constitute the violation. The contempt proceeding was entered upon the civil docket, being cause "No. 2863, Civil, *Securities and Exchange Commission* v. *Penfield Company of California*." Young was first commanded to appear and show cause why a further order should not be made directing him "to show cause why an order should not be made holding said A. W. Young in contempt of

And issuance of the citation was grounded upon disobedience of the court's lawful order for their production.[3]

This act, like the act of disobedience in the *Gompers* case, constituted conduct which would have sustained either civil or criminal penalty in appropriate proceedings. But the unequivocal ruling of that case was that criminal penalties cannot be applied in civil contempt proceedings. 221 U. S. at 444, 449, 451–452. Not only the result, but the whole tenor of the opinion was to the effect that the character of the proceeding as a whole, whether as civil or criminal, must be correlated with the character of the penalty imposed, and that the two cannot be scrambled, regardless of the fact that the conduct constituting the contempt would support the imposition of either type of relief in a proceeding appropriate to the kind of relief given.[4] Not simply the remedy sought but the character of the proceeding in which it is pursued, it was held, determines the validity of the relief afforded.[5]

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this Court and to be dealt with accordingly." The order of citation followed in the same terms. At the hearing counsel for the Commission maintained consistently and urgently that the proceeding was exclusively civil, not criminal in character. Not until pronouncement of judgment was any step taken indicating the proceeding to be criminal in nature.

[3] The validity of the order for production was sustained on appeal. 143 F. 2d 746.

[4] See the Court's discussion in *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, particularly at pp. 444–449, 451 ff.; see also discussion in *United States* v. *United Mine Workers*, 330 U. S. —, dissenting opinion, p. —, Part III.

[5] The *Gompers* opinion, as I understand it, does not hold that the character of the relief sought is exclusively the criterion of the character of the proceeding. It was said to be a factor to be taken into account. But, in view of the Court's stress upon other factors, including the private or public character of the complainant, whether or not the contempt proceeding arises in and as corollary to civil litigation, and the necessity for observing distinct procedural requirements in the course of trial, the case seems clearly to rule that the character of the proceeding determines the nature of the relief which can be given rather than the reverse.

This ruling, as I have previously maintained, was one not only of historical grounding but of constitutional compulsion.[6] Moreover, it recently has been reinforced by Rule 42 (b) of the Federal Rules of Criminal Procedure, requiring that the notice prescribed for instituting the proceeding "shall state the essential facts constituting the *criminal* contempt charged and *describe it as such.*"[7] (Emphasis added.)

Hence, under the rule of the *Gompers* case and others following it, it is clear that the district judge had no power in this case to impose the criminal penalty of a flat $50 fine and it is equally clear, on the record,[8] that he ex-

[6] See the references cited in note 4 *supra;* and see note 5.

[7] "A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. . . ." Rule 42 (b). Federal Rules of Criminal Procedure. See *United States* v. *United Mine Workers*, 330 U. S. —, dissenting opinion, p. —, and note 45.

The rule did not become effective until March 21, 1946, hence was not applicable to the present proceeding which was instituted and concluded in the trial court prior to that date.

[8] See text *infra*. The record does not show that the function of the subpoena had been exhausted at the time of the judgment in contempt, although this was Young's contention accepted, apparently, by the District Court. The contrary, in fact, affirmatively appears. The subpoena did not purport to be issued exclusively in connection with and for the purposes of the criminal trial which transpired in the District Court between its issuance and the time of the judgment in contempt. Counsel for the Commission expressly stated that the subpoena was not limited to that matter and the court said, after referring to the period of the criminal suit: "Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I do not know."

The court made no finding that the subpoena's function had been exhausted. The only reason assigned for refusing civil relief was that

ceeded his power in denying the Commission civil coercive relief altogether.[9]

Moreover, I think it is clear that both of these problems are presented for our determination on the state of the record here. It is true that Young did not appeal from the District Court's judgment to the Circuit Court of Appeals, and that he paid the fine. But the Commission appealed from that judgment in its entirety, as it had a right to do,[10] unless the payment of the fine exhausted all judicial power to deal further with the proceeding. This indeed is a basis upon which Young maintains that the Circuit Court of Appeals had no power to reverse the District Court's judgment.[11]

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the court had sat in the criminal trial for six weeks during which it had "listened to books and records," as well as witnesses produced "from all over the United States in connection with the Penfield matter." Taking judicial notice of its own proceedings, the court said: ". . . in that trial the evidence was clear and definite . . . that during one period of time this defendant [Young] had nothing whatsoever to do with the Penfield Company." These grounds, of course, were not the equivalent of finding that the records covered by the subpoena had been produced or that the Commission had no power or valid reason for pursuing its statutory investigation through the subpoena beyond the confines of the closed criminal trial.

[9] See note 8. And see text *infra* preceding note 20.

[10] 28 U. S. C. § 225; see *Clarke* v. *Federal Trade Commission*, 128 F. 2d 542; *Lamb* v. *Cramer*, 285 U. S. 217, 220.

[11] The principal contention in this respect is based on § 268 of the Judicial Code, 28 U. S. C. § 385, and the decision in *In re Bradley*, 318 U. S. 50. The *Bradley* case, however, was one in criminal contempt and the decision was that in such a case § 268 forbids imposition as penalty of both fine and imprisonment. The penalties being alternative by the section's terms, it was held that payment of the fine exhausted the court's power.

The *Bradley* case therefore presented no question of the applicability of § 268 in civil contempt proceedings or of its effect if applicable. Compare the majority and concurring opinions in *In re Sixth & Wisconsin Tower, Inc.*, 108 F. 2d 538. It cannot be taken as having ruled that the court's invalid imposition of criminal punishment in civil

But clearly, as the Court holds, such power could not be wanting, if the litigation was exclusively civil in character. On the contrary the action of the Circuit Court of Appeals was exactly in accordance with the ruling in the *Gompers* case and was required by it. In both cases the proceedings were wholly civil in character. In both a criminal penalty was imposed. And in both the judgment laying it was reversed and the cause was remanded to the trial court for further proceedings looking only to the giving of civil relief.

The only difference is that in the *Gompers* case the contemnors had not entered upon the service of the void criminal sentence of imprisonment but appealed from it, while here Young paid the fine and did not appeal. That action on his part, however, cannot oust the Commission of its statutory right of appeal and review or of its right to civil relief.[12] If the contempt proceeding were criminal in character, a different question might be presented.[13] But compliance with a void criminal penalty, void because imposed in a wholly civil proceeding, cannot make it valid or oust either the courts of their civil jurisdiction in matters of relief or opposing parties of their rights in that respect.

In short, the Commission was forced to appeal from the judgment rendered, if it was not to acquiesce in what the court had done and thereby suffer unauthorized thwarting

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contempt proceedings or satisfaction of such a void sentence exhausts either the trial court's power or that of an appellate court on review to deal with the civil contempt by affording civil relief or to avoid the invalid criminal judgment.

Whether or not § 268, if applicable to a so-called mixed civil-criminal contempt proceeding, would forbid the imposition of relief both by way of fine and imprisonment, one punitive, the other coercive and remedial, need not be considered in view of the holding that this proceeding was exclusively civil in character.

[12] See notes 10, 14.

[13] See note 11 *supra*.

of its statutory investigating power. That judgment was rightfully taken in its entirety to the Circuit Court of Appeals, was reviewed by that court, and was reversed not partially but completely.[14] Our action in granting certiorari brought here for review the entire judgment of the Circuit Court of Appeals, including its reversal of the criminal judgment rendered by the District Court as well as its mandate for civil relief.[15] Hence in my opinion we

[14] The opinion of the Circuit Court of Appeals states: "Young did not appeal from the order holding him in contempt. That decision is final and the only question before us is the extent of the remedy to which the Commission is entitled." 157 F. 2d 65, 66. Ruling that the cause did not become moot by reason of Young's payment of the fine, the court further held the District Court had abused its "discretion" in not granting the full relief sought by the Commission. The concluding paragraph of the opinion stated: "The order imposing the fine is reversed and the case remanded to the district court for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question." The opinion concluded: "The order of the district court is reversed," 157 F. 2d at 67, and the formal order for judgment entitled "decree" directed "that the order of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court."

The notice of appeal filed in the District Court is not set forth in the printed record here. But the "Statement of Points on Which the Appellant Intends to Rely," filed in the Court of Appeals, specifies that "the District Court erred in ordering Young to pay a fine of $50.00 instead of imposing a remedial penalty calculated to coerce Young to produce or allow inspection of the books and records. . . ."

In this state of the record it cannot be taken that the appeal and the judgment of the Court of Appeals did not comprehend the criminal penalty.

[15] This Court's action in granting certiorari, 329 U. S. —, was not limited to any question or phase of the Court of Appeals' action, but brought up the judgment in its entirety. Since that court's judgment comprehended the reversal of the criminal penalty imposed by the District Court, that phase of the Court of Appeals' judgment is necessarily here for review and determination.

are forced to take action upon the judgment as a whole, in both civil and criminal phases.

Since I am in agreement with the Court's view that the *Gompers* ruling and others in accord with it are controlling in this case, I think the judgment of the Circuit Court of Appeals should be affirmed, though with modification in one respect.[16] I find it difficult, however, to reconcile the action taken here with what was done in the *Mine Workers* decision. A majority there held, as I thought contrary to the *Gompers* ruling, that civil and criminal contempt could be prosecuted in a single contempt proceeding conducted according to the rules of procedure applicable in equity causes,[17] and that both types of relief, civil and criminal, could be imposed in such a mixed proceeding. It was also held that on review the appellate court is free to substitute its own judgment concerning the nature and extent of both types of relief for that of the trial court, and therefore that in remanding the cause for further proceedings there was no necessity to leave room for the further exercise of the trial court's discretion in relation to either type of relief.

If in that case a single mixed proceeding could suffice without regard to the requirements of Rule 42 (b) and the *Gompers* line of decisions concerning procedures to be followed in instituting and conducting contempt proceedings, for the imposition of both civil and criminal penalties, I see no valid reason why the same thing could not be done in this cause or why both the criminal fine imposed by the District Court and the civil relief given by the Circuit Court of Appeals should not be allowed to stand.

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[16] See text at note 20.

[17] See *United States* v. *United Mine Workers*, 330 U. S. —, dissenting opinion, p. —, Part VI. The rule to show cause issued in that case provided: "IT IS FURTHER ORDERED, that the accused, and each of them, *shall, unless waived by them, be tried* upon said charges of contempt by the court *with an advisory jury* to be empanelled by this court." (Emphasis added.) The advisory jury was waived.

It is true that if the proceeding is to be taken as having been both civil and criminal a serious question would be presented on the terms of § 268 of the Judicial Code whether imposition and payment of the fine here did not exhaust judicial power to deal further with the proceeding, more especially in its criminal phase.[18] But that question too, I take it, necessarily would be settled if the *Mine Workers* ruling were to govern here.

It is also true that in this case the United States was not a party by that name, as it was in the *Mine Workers* case, to the civil litigation in which the contempt proceeding arose or to the contempt proceeding itself. But the Commission was the moving party in both, representative as such of the public interest as the trial court pointed out.[19] And, in view of the vast liberality allowed by the *Mine Workers* decision concerning matters of procedure and relief in contempt proceedings, it hardly can be a solid ground for distinguishing the cases that in one the public interest was represented, as to the criminal phase, *eo nomine* United States, in the other under the name of the Securities and Exchange Commission. Cf. *In re Bradley*, 318 U. S. 50. Indeed the record shows that in the present case the United States Attorney and the Assistant United States Attorney participated in the contempt proceeding in the District Court.

Notwithstanding these difficulties, since the Court rests the decision in this cause upon the *Gompers* rule, which in my opinion represents the settled law, I join in the affirmance of the judgment of the Circuit Court of Appeals, both

[18] See note 11 *supra* and text.

[19] The court inquired of Commission counsel, in response to argument that the proceeding was exclusively civil, since it arose in the course of civil litigation and sought only remedial relief for one of the parties, and not as an independent proceeding in the public interest to vindicate the court's power: "The Securities and Exchange Commission does not operate for itself, does it? I mean it operates in the public interest doesn't it?"

insofar as it reversed the District Court's judgment because of the denial of coercive relief and in relation to its reversal of the criminal penalty imposed by the District Court.

But, while there can be no question of the Court of Appeals' power in proper cases to review and revise civil relief given in the District Court, in this case no such relief had been awarded. In my opinion the question of the character and scope of that relief was a matter, in the first instance, for the District Court's judgment rather than for the Court of Appeals. Accordingly, I would modify the judgment of reversal in the civil phase so that the cause would be remanded to the District Court with directions to exercise its discretion in framing the relief adequate and appropriate to make effective the Commission's right to disclosure.[20]

[20] *E. Ingraham Co.* v. *Germanow*, 4 F. 2d 1002, 1003.

SUPREME COURT OF THE UNITED STATES

No. 453.—October Term, 1946.

The Penfield Company of California and A. W. Young, Petitioners, *v.* Securities and Exchange Commission.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 31, 1947.]

Mr. Justice Frankfurter, with whom concurs Mr. Justice Jackson, dissenting.

Beginning with the Interstate Commerce Act in 1887, it became a conventional feature of Congressional regulatory legislation to give administrative agencies authority to issue subpoenas for relevant information. Congress has never attempted, however, to confer upon an administrative agency itself the power to compel obedience to such a subpoena. It is beside the point to consider whether Congress was deterred by constitutional difficulties. That Congress should so consistently have withheld powers of testimonial compulsion from administrative agencies discloses a policy that speaks with impressive significance.

Instead of authorizing agencies to enforce their subpoenas, Congress has required them to resort to the courts for enforcement. In the discharge of that duty courts act as courts and not as administrative adjuncts. The power of Congress to impose on courts the duty of enforcing obedience to an administrative subpoena was sustained precisely because courts were not to be automata carrying out the wishes of the administrative. They were discharging judicial power with all the implications of the judicial function in our constitutional scheme. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; 155 U. S. 3. Accordingly, an order directing obedience to a subpoena by the Securities and Exchange Commission,

like a subpoena of any other federal agency, does not issue as a matter of course. An administrative subpoena may be contested on the ground that it exceeds the bounds set by the Fourth Amendment against unreasonable search and seizure; that the inquiry is outside the scope of the authority delegated to the agency; that the testimony sought to be elicited is irrelevant to the subject matter of the inquiry; that the person to whom it is directed cannot be held responsible for the production of the papers. See *Interstate Commerce Commission* v. *Brimson, supra*, at 479 and 489; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434; *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186. And see Lilienthal, *The Power to Compel Testimony*, 39 Harv. L. Rev. 694.

In this case, the Securities and Exchange Commission issued a subpoena to Young, as officer of the Penfield Company, for the production of books and records of the company covering the period May 1, 1939, to April 9, 1943. Upon Young's failure to comply, the Commission applied to the District Court, on April 13, 1943, for an order compelling obedience. From this order an appeal was taken to the Circuit Court of Appeals which affirmed the order on June 30, 1944, 143 F. 2d 746, its mandate being spread on the record of the District Court on December 7, 1944. Young having persisted in his refusal to comply, the Securities and Exchange Commission, on January 24, 1945, applied for a rule to show cause why he should not be cited for contempt. The District Court postponed final hearings on the order to show cause, pending, apparently, the completion of a criminal trial of Young and the Penfield Company then before the Court, on an indictment growing out of the inquiry for which the subpoena had been issued. It was not until July 2, 1945, after the petitioners had been

acquitted in the criminal proceeding, that the rule to show cause was heard.

The District Court found petitioner Young guilty of contempt of court for disobedience of its order of June 1, 1943, requiring the production of records called for by the subpoena issued by the S. E. C. But the Court refused the Government's request to impose a contingent punishment to secure production of the records. Instead, it sentenced Young to the payment of a fine of $50. Without objection Young paid this fine, and consistently thereafter maintained that by such payment judicial power had exhausted itself. See *In re Bradley*, 318 U. S. 50. The Government appealed from this disposition by the District Court on the ground that the District Court, having adjudged Young to be in contempt, erred in ordering Young to pay a fine of $50 and stand committed until the fine was paid, instead of imposing a remedial penalty, calculated to coerce Young to produce or allow inspection of the books and records of the Penfield Co., pursuant to the order of June 1, 1943. On the basis of this appeal, which challenged what the District Court did and what it refused to do, the Circuit Court of Appeals reversed the order of the lower court: "The order imposing the fine is reversed and the case remanded to the district court for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question." 157 F. 2d 65, 67. This Court then granted certiorari, the petition for which asked this Court to "reverse the judgment and order of the Circuit Court of Appeals in this case." There was thus properly before the Circuit Court of Appeals the judgment imposing the fine of $50 and refusing to give coercive remedy, and there is accordingly before us the correctness of the judgment of the Circuit Court of Appeals setting aside the $50 fine and ordering a coercive decree.

The judgment immediately before us is that of the Circuit Court of Appeals setting aside the fine imposed

by the District Court and reversing its refusal to issue a coercive order. The ultimate question is the correctness of what the District Court did and what it refused to do. It is essential therefore to focus attention on the precise circumstances in which the District Court acted as it did. This is what the record tells us:

"Mr. Cuthbertson: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refused to produce his books and records for our inspection.

"The Court: I don't think that I am going to be disposed to do anything like that. I sat here for six weeks and listened to books and records. The Government produced people from all over the United States in connection with the Penfield matter.

"Mr. Cuthbertson: I might say, your Honor, that we have in mind that these books and records may disclose certain acts other than those charged in the indictment. We don't propose to go over the same matter that the Court went over in connection with the criminal case.

"The Court: The Court can take judicial notice of its own books and records, and in that trial the evidence was clear and definite and positive from all of the Government's witnesses, that during one period of time this defendant had nothing whatsoever to do with the Penfield Company. Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know.

"The judgment and sentence of the Court is that the defendant pay a fine of $50, and stand committed until paid."

Bearing in mind that the District Court was not an automaton which must unquestioningly compel obedience to a subpoena simply because the Commission had issued it, we must consider whether the District Court had abused the fair limits of judicial discretion. If a district court believes that howsoever relevant a demand for documents may have been at the time it was made, circumstances had rendered the subpoena obsolete, it is entitled to consider the merits of the subpoena as of the time that its enforcement is sought and not as of the time that it was issued. The above colloquy means nothing unless it means that Judge Hall was of the view that events had apparently rendered needless the call from Young for the documents. He may have been wrong in that belief. At all events it was the view of a judge who had presided for six weeks over a trial in which these matters were canvassed. The Circuit Court of Appeals did not have before it, nor have we, the knowledge or the basis for knowledge that Judge Hall had, and so neither court can say with any confidence that he did not have ground for thinking that the change in circumstances revealed in the course of the trial obviated the need for the demand that was made upon Young. We surely ought not to reverse the action of the district judge on the abstract assumption that papers ordered to be produced as relevant to an inquiry at the time the subpoena issued continued relevant several months later. We ought not to assume that a subpoena was proper months later when a proceeding lasting more than six weeks before the judge who had approved the subpoena in the first instance persuaded him that the circumstances no longer called for carrying out the terms of the subpoena. When the trial judge stated his understanding that the intervening circumstances had rendered inappropriate the use of his coercive powers, counsel for the Government did not gainsay the judge's view. The failure of Government counsel to contradict the interpretation of facts by the Court does not

present any technical ground of not allowing a point to be raised on appeal to which no exception was taken. The significance of counsel's silence is its confirmation of the judge's interpretation of the circumstances. At least in the absence of contradiction, the interpretation of the facts by the trial judge was a proper basis for the exercise of his judicial discretion.

On the record before us, Judge Hall exercised allowable discretion in finding that the subpoena had spent its force, and in concluding not to compel obedience to it. At the same time, he was justified in finding that because Young had disobeyed the subpoena while it was still alive, he should be fined and made to feel that one cannot flout a court's authority with impunity.

The question, then, is whether the Court could impose what constituted a fine for criminal contempt, that is, to vindicate the law as such, without a formal pleading charging Young with such disobedience. We do not think Judge Hall had to direct the clerk to issue an attachment against Young to inform him of that which he obviously knew and which the proceedings had made abundantly clear to him. The true significance of our opinion in *United States* v. *United Mine Workers*, 330 U. S. —, as we understand it, is that contempt proceedings are *sui generis* and should be treated as such in their practical incidence. They are not to be circumscribed by procedural formalities, or by traditional limitations of what are ordinarily called crimes, except insofar as due process of law and the other standards of decency and fairness in the administration of federal justice may require. On this record we find not the faintest denial of any safeguard or of appropriate procedural protection.

We think the judgment of the Circuit Court of Appeals should be reversed and that of the District Court reinstated.